Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–149 OF 2005
LOW HOP BING, MOHD HISHAMUDIN AND ZAHARAH IBRAHIM JJCA
27 AUGUST 2010

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Companies and Corporations — Winding up — Creditor, secured — Whether exempted from prohibition of s 223 of the Companies Act 1965 — Whether s 223 designed to protect only unsecured creditors — Whether secured creditor could dispose security of wound up company without leave of court — Whether there was difference between sale by way of power of attorney and sale by receiver and manager pursuant to debenture

D

Land Law — Charge — Enforcement of — Whether sale undertaken by chargee bank and not by chargor valid — Whether sale had to be judicial sale — Whether there was difference between sale by secured creditor by way of power of attorney and sale by receivers and manager — Whether charged land could be sold contrary to provisions of National Land Code

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Land Law — Power of attorney — Irrevocable — Contained in debenture — Whether revoked when company wound up — Whether Power of Attorney Act 1949 did not apply to companies and corporations — Whether benefit of s 6 of the Power of Attorney Act 1949 only given to purchasers

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The appellant was the registered proprietor of seven parcels of land situated in Bandar Klang ('the land'). The appellant executed a charge under the National Land Code ('the NLC') over the land in favour of the first respondent to secure an overdraft facility of RM1.5m. The overdraft facility was also secured by a debenture which contained an irrevocable power of attorney ('the PA') in favour of the first respondent, for valuable consideration. When the plaintiff defaulted in its repayment the first respondent made a demand for payment. Subsequently, after the plaintiff was ordered to be wound up, the first respondent bank gave notice to the plaintiff that it would sell the land under the debenture. The first respondent as attorney under the PA entered into a sale and purchase agreement ('the SPA') with the second respondent for the sale of the land at RM1.9m. The appellant's shareholders filed an application seeking, inter alia, an order and declaration that the first respondent was not entitled to enforce its rights under the debenture after the plaintiff had been wound up

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and an order to declare the sale of the land to the second respondent to be null and void. However, that originating summons application was dismissed with costs and hence the present appeal. The appellant submitted that the sale of the land by the first respondent bank was void because a PA did not survive a winding up, and also because the sale, which was carried out by the first respondent utilising the PA, was ultra vires the NLC, as the land was charged under the Code. The appellant cited the Powers of Attorney Act ('Act') to support its stand that the Act did not apply to corporations, which meant that the donor of the power had to be a natural person and not a company; that the benefit of s 6 of the Act was given only to purchasers and that the first respondent bank as a lender could not rely on the PA; that a PA did not survive a winding up. The appellant further submitted that the sale of the land to the second respondent was void in view of s 223 of the Companies Act 1965 ('the CA'), because the first respondent had not applied for the leave of the court to exercise it power to sell the land. The first respondent responded that the sale of the land was not contrary to the NLC and stressed that the winding up order against the appellant did not affect the validity of the PA. The second respondent submitted that the fact that the appellant was in liquidation when the sale of the land was effected by the first respondent bank had no bearing on the sale itself and that the sale by the first respondent was conducted in exercise of a valid and irrevocable PA granted by the appellant to the first respondent to sell the land.

Held, dismissing the appeal with costs:

(1) (per **Low Hop Bing JCA** and **Zaharah Ibrahim JCA**) Although the appellant relied on the Federal Court decision in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 (*Kimlin*'s case), the facts and questions of law in *Kimlin*'s case were readily distinguishable from the facts of the instant appeal. In *Kimlin*'s case the court was invited to determine the power of sale to be exercised by receivers and managers ('R & Ms') as the debenture did not contain a power of attorney. It did not have anything to do with an attorney appointed pursuant to a PA in the debenture as in the instant appeal and thus was of no assistance to the appellant in this case. On the facts of this appeal s 223 of the CA was inapplicable because the first respondent was exercising its right under a security when it sold the land. By virtue of the PA in the debenture, the first respondent was acting for and on behalf of the appellant as the chargor when it executed the SPA for the sale of the land to the second respondent. As such the provisions of the NLC did not apply. Further s 223 of the CA was designed to protect unsecured creditors leaving the rights of secured creditors intact (see paras 23–26, 29, 165, 169, 172 & 182).

(2) (per **Low Hop Bing JCA** and **Zaharah Ibrahim JCA**) The applicability of the Act to corporations had been accepted by various courts including the appellate courts. The Federal Court case of *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201; [2005] 1 AMR 585 (*Balasubramaniam*'s case) is one authority for this and for the proposition that a power of attorney was not cancelled by a winding up order or by the combined effect of ss 300 and 305 of the CA. The appellant submitted that the Federal Court had arrived at a wrong decision in *Balasubramaniam*'s case, but this court was legally bound to apply the ratio of that case. Further, in the instant case when s 3(1)(a) of the Act and Form II in the Schedule thereto are read and construed conjunctively it became obvious that a company is competent to create a PA, so long as the form of authentication had been meticulously complied with, as has been done in this case. It was found that the PA in the present case had satisfied all the requirements for a valid PA either under the Act or at common law. In addition, upon a careful reading of the two alternative limbs in s 6(1)(a) of the Act it was found that in the absence of the concurrence of the donee, ie the first respondent bank, the PA could not be revoked by the appellant borrower at all. As such, the first respondent as attorney of the appellant under the irrevocable PA was entitled to sell the land pursuant thereto. Hence the PA would not be affected by any winding up order and would remain effective and enforceable at the instance of the first respondent (see paras 34(a)–(b), 35–36, 39–40, 47, 137 & 142).

(3) (per **Low Hop Bing JCA**) The appellant's submission that the word 'purchaser' in s 6(1) of the Act referred to a purchaser of property and not a lender such as the first respondent bank is a product of literal interpretation. However, in accordance with the maxim noscitur a sociis, the 'purchaser' in the context of s 6(1) of the Act necessarily means the purchaser of the PA. The bank by giving valuable consideration in the form of the loan to the appellant was the purchaser of the PA. This construction was in complete consonance with the purposive approach. Alternatively the sale of the land by the first respondent to the second respondent purchaser was within the ambit of s 6(1)(a) of the Act (see paras 48 & 50).

(4) (per **Low Hop Bing JCA**) As the PA was valid, the first respondent as the appellant's attorney did not come within the ambit of any of the provisions of s 4(1)(a) and (b) read with ss 300 and 305 of the CA (see para 51).

(5) (per **Mohd Hishamuddin JCA**, dissenting) In the instant case it was not disputed that the appellant was the registered owner of the land, that the appellant had been wound up at the time of the sale and that no

permission of the court pursuant to s 223 of the CA had been obtained in respect of the sale. The prohibition under s 223 of the CA was clear. Therefore, the sale by the first respondent, which was in contravention of a statutory prohibition, was null and void. Further, there is no provision in the CA or the Bankruptcy Act that states that a secured creditor is exempted from obtaining the winding up court's permission under s 223 of the CA in the event that he wished to sell the security, whether pursuant to the provisions of the debenture or a PA (see paras 61–63 & 69).

(6) (per **Mohd Hishamuddin JCA**, dissenting) *Balasubramaniam*'s case had no bearing whatsoever on s 223 of the CA. The case did not state that a secured creditor was exempted from the prohibition of s 223 of the CA. *Kimlin*'s case was relevant in that it determined the interpretation and application of s 223 of the CA. According to *Kimlin*'s case, so long as the property intended to be sold belonged to the company and that company had been wound up, the approval of the High Court had to be obtained by reason of s 223 of the CA. Otherwise the sale would not be valid. Further, for the purpose of s 223 , it made no difference whether the sale was by way of a PA or a sale by R & Ms under a debenture (see paras 72–73, 77 & 79).

(7) (per **Mohd Hishamuddin JCA**, dissenting) When the land besides being charged under the debenture was at the same time charged to the first respondent bank under the NLC, then the provisions of the NLC prevailed over the provisions of the debenture and the PA except where the sale was done by the chargor with the consent of the chargee. Since the sale in the instant case was not a judicial sale but one undertaken by the chargee and not by the chargor, it was invalid (see paras 84 & 98).

[Bahasa Malaysia summary

Perayu adalah tuan punya berdaftar tujuh bidang tanah yang terletak di Bandar Klang ('tanah tersebut'). Perayu telah memasukkan gadaian di bawah Kanun Tanah Negara ('KTN') ke atas tanah tersebut menyebelahi responden pertama untuk menjamin kemudahan overdraf sejumlah RM1.5 juta. Kemudahan overdraf itu juga dijamin oleh debentur yang mengandungi surat kuasa wakil yang tak boleh batal ('SKW') menyebelahi responden pertama, untuk balasan bernilai. Apabila plaintif gagal membuat bayaran balik, responden pertama membuat tuntutan bayaran. Berikutan itu, setelah plaintif diperintah agar digulung, responden pertama bank telah memberi notis kepada plaintif bahawa ia akan menjual tanah tersebut di bawah debentur. Responden pertama sebagai wakil di bawah SKW telah memasuki perjanjian jual beli ('PJB') dengan responden kedua untuk menjual tanah tersebut pada harga RM1.9 juta. Pemegang saham perayu telah memfailkan permohonan memohon, antara lain, perintah dan deklarasi bahawa responden pertama tidak berhak menguatkuasakan haknya di bawah debentur setelah plaintif

digulung dan perintah untuk mengisytiharkan jualan tanah tersebut kepada responden kedua sebagai terbatal dan tak sah. Walau bagaimanapun, permohonan saman pemula tersebut telah ditolak dengan kos dan justeru itu rayuan ini. Perayu telah berhujah bahawa jualan tanah tersebut oleh responden pertama bank adalah tak sah kerana SKW tidak dapat kekal dalam penggulungan dan juga kerana jualan itu, yang dilaksanakan oleh responden pertama dengan menggunakan SKW, adalah ultra vires KTN, kerana tanah tersebut telah dicagarkan di bawah Kanun itu. Perayu telah memetik Akta Surat Kuasa Wakil 1949 ('Akta') untuk menyokong pendiriannya bahawa Akta itu tidak terpakai kepada syarikat, yang bermaksud bahawa pemberi kuasa hendaklah orang biasa dan bukan syarikat; bahawa manfaat s 6 Akta diberikan hanya kepada pembeli-pembeli dan bahawa responden pertama bank sebagai pemberi pinjaman tidak boleh bergantung kepada SKW; bahawa SKW tidak dapat dikekalkan dalam penggulungan. Perayu selanjutnya berhujah bahawa jualan tanah tersebut kepada responden kedua adalah tak sah menurut s 223 Akta Syarikat 1965 ('AS'), kerana responden pertama tidak memohon kebenaran mahkamah untuk menggunakan kuasanya bagi menjual tanah tersebut. Responden pertama menjawab bahawa jualan tanah tersebut tidak bertentangan dengan KTN dan menegaskan bahawa perintah penggulungan terhadap perayu tidak menjejaskan kesahan SKW. Responden kedua berhujah bahawa fakta bahawa perayu dalam pembubaran apabila jualan dilaksanakan oleh responden pertama bank tiada kesan ke atas jualan itu sendiri dan jualan oleh responden pertama telah dijalankan dengan menggunakan SKW yang sah dan tidak boleh batal yang diberikan oleh perayu kepada responden pertama untuk menjual tanah tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Low Hop Bing HMR** dan **Zaharah Ibrahim HMR**) Meskipun perayu bergantung ke atas keputusan Mahkamah Persekutuan dalam kes *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 ('kes *Kimlin*'), fakta dan persoalan undang-undang dalam kes *Kimlin* amat berbeza daripada fakta rayuan ini. Dalam kes *Kimlin* mahkamah diminta menentukan kuasa jualan yang patut digunakan oleh penerima dan pengurus ('P & P') kerana debentur tidak mengandungi surat kuasa wakil. Ia tiada kaitan dengan wakil yang dilantik menurut SKW dalam debentur seperti dalam rayuan ini dan oleh itu tidak membantu perayu dalam kes ini. Berdasarkan fakta rayuan ini s 223 AS tidak terpakai kerana responden pertama melaksanakan haknya di bawah cagaran apabila ia menjual tanah tersebut. Menurut SKW dalam debentur, responden pertama bertindak untuk dan bagi pihak perayu sebagai penggadai apabila ia menyempurnakan PJB untuk jualan tanah tersebut kepada responden kedua. Oleh itu peruntukan KTN tidak terpakai. Selanjutnya s 223 telah digubal untuk melindungi pemiutang bercagar

dengan meninggalkan hak pemiutang bercagar dilindungi (lihat perenggan 23–26, 29, 165, 169, 172 & 182).

(2) (oleh **Low Hop Bing HMR** dan **Zaharah Ibrahim HMR**) Pemakaian Akta tersebut ke atas koperasi telah diterima oleh pelbagai mahkamah termasuklah mahkamah rayuan. Kes Mahkamah Persekutuan *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201; [2005] 1 AMR 585 ('kes *Balasubramaniam*') adalah salah satu daripada autoriti untuk ini dan untuk saranan bahawa SKW tidak dibatalkan oleh perintah penggulungan atau oleh gabungan kesan ss 300 dan 305 AS. Perayu berhujah bahawa Mahkamah Persekutuan telah mencapai keputusan yang salah dalam kes *Balasubramaniam* tetapi mahkamah ini terikat secara sah untuk memohon ratio kes tersebut. Selanjutnya, dalam kes ini di mana s 3(1)(a) Akta dan Borang II dalam Jadual dibaca dan ditafsirkan bersama ia menjadi jelas bahawa sebuah syarikat adalah kompeten untuk membentuk SKW, selagi formaliti pengesahan telah dipatuhi dengan terperinci, seperti yang telah dilakukan dalam kes ini. Adalah didapati bahawa SKW dalam kes ini telah memenuhi semua keperluan untuk SKW sah sama ada di bawah Akta tersebut atau dalam *common law*. Selanjutnya, setelah bacaan teliti dua cabang alternatif dalam s 6(1)(a) Akta tersebut adalah didapati bahawa dengan ketiadaan persetujuan penerima derma, iaitu responden pertama, SKW tidak boleh dibatalkan sama sekali oleh perayu. Oleh itu, responden pertama sebagai peguam perayu di bawah SKW tak boleh batal berhak menjual tanah tersebut menurutnya. Justeru itu SKW tidak terjejas oleh apa-apa perintah penggulungan dan masih berkesan dan berkuat kuasa atas permohonan responden pertama (lihat perenggan 34(a)–(b), 35–36, 39–40, 47, 137 & 142).

(3) (oleh **Low Hop Bing HMR**) Hujah perayu bahawa perkataan 'purchaser' dalam s 6(1) Akta tersebut merujuk kepada pembeli hartanah dan bukan pemberi pinjaman kerana responden pertama bank adalah hasil pentafsiran secara harfiah. Walau bagaimanapun, menurut maxim noscitur a sociis, 'purchaser' dalam konteks s 6(1) Akta semestinya pembeli SKW. Bank dengan memberikan balasan bernilai dalam bentuk pinjaman kepada perayu adalah pembeli SKW. Pentafsiran ini adalah jelas sejajar dengan pendekatan tujuan. Secara alternatif jualan tanah tersebut oleh responden pertama kepada responden kedua adalah dalam skop s 6(1)(a) Akta tersebut (lihat perenggan 48 & 50).

(4) (oleh **Low Hop Bing HMR**) Oleh kerana SKW adalah sah, responden pertama sebagai wakil perayu tidak terjatuh dalam skop apa-apa peruntukan s 4(1)(a) dan (b) dibaca dengan ss 300 dan 305 AS (lihat perenggan 51).

(5) (oleh **Mohd Hishamuddin HMR**, menentang) Dalam kes ini adalah tidak dipertikaikan bahawa perayu merupakan tuan punya berdaftar tanah tersebut, bahawa perayu telah digulungkan pada masa jualan dan bahawa tiada kebenaran mahkamah menurut s 223 AS telah diperoleh berkaitan jualan itu. Larangan di bawah s 223 AS adalah jelas. Oleh itu, jualan oleh responden pertama, yang bertentangan dengan larangan statutori, adalah terbatal dan tak sah. Selanjutnya, tiada peruntukan dalam AS atau Akta Kebankrapan 1967 yang menyatakan bahawa pemiutang bercagar terkecuali daripada mendapatkan kebenaran penggulungan mahkamah di bawah s 223 AS sekiranya dia ingin menjual cagaran itu, sama ada menurut peruntukan debentur atau SKW (lihat perenggan 61–63 & 69).

(6) (oleh **Mohd Hishamuddin HMR**, menentang) Kes *Balasubramaniam* tiada kaitan dengan s 223 AS. Kes tersebut tidak menyatakan bahawa pemiutang bercagar terkecuali daripada larangan s 223 AS. Kes *Kimlin* adalah relevan kerana ia menentukan pentafsiran dan pemakaian s 223 AS. Menurut kes *Kimlin*, selagi hartanah yang ingin dijual milik syarikat dan bahawa syarikat itu telah digulungkan, kebenaran Mahkamah Tinggi perlu diperoleh oleh sebab s 223 AS. Jika tidak jualan tersebut adalah tidak sah. Selanjutnya, bagi tujuan s 223, tidak ada perbezaan sama ada jualan melalui SKW atau jualan melalui penerima dan pengurus di bawah debentur (lihat perenggan 72–73, 77 & 79).

(7) (oleh **Mohd Hishamuddin HMR**, menentang) Apabila tanah tersebut, selain daripada digadaikan di bawah debentur adalah pada masa sama digadaikan kepada responden pertama bank di bawah KTN, maka peruntukan KTN mengatasi peruntukan debentur dan SKW kecuali di mana jualan itu telah dilakukan oleh penggadai dengan persetujuan pemegang gadaian. Oleh kerana jualan dalam kes ini bukan jualan kehakiman tetapi suatu yang telah dilaksanakan oleh pemegang gadaian dan bukan oleh penggadai, ia adalah tidak sah (lihat perenggan 84 & 98).]

Notes

For cases on enforcement of charge, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2297–2304.

For cases on power of attorney generally, see 8(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3571–3572.

For cases on winding up generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 973–1601.

Cases referred to

Attorney-General v Lamplough (1878) 3 Ex D 214 (refd)

Bank Bumiputra Malaysia Bhd & Ors v Kimlin Housing Development Sdn Bhd (in receivership) [1993] 2 MLJ 126, HC (refd)

Chon Ah Jee @ Chuan Teck Chun & Ors v Lim Tian Huat (as the receiver and manager appointed for Bigraise Telipok Sdn Bhd) & Anor [2010] 4 MLJ 270; [2010] 7 AMR 584, HC (refd)

Denney v John Hudson & Co Ltd [1992] BCLC 901; [1992] BCC 503, CA (refd)

Director of Customs, Federal Territory v Ler Cheng Chye (liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600, SC (refd)

Gray's Inn Construction Co Ltd, Re [1980] 1 All ER 814; [1980] 1 WLR 711, CA (refd)

K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor [2005] 2 MLJ 201; [2005] 1 AMR 585, FC (distd)

Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805, SC (distd)

Malayan Banking Bhd v The Official Assignee [Receivers of the estate of Velu Marimuthu (Bankrupt)] [1993] 2 AMR 3400, HC (refd)

Margart Pty Ltd (in liq), Re; Hamilton v Westpac Banking Corp (1984) 2 ACLC 709, SC (refd)

Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd (in receivership) & Anor [2000] 3 MLJ 304; [2000] 3 CLJ 127, CA (refd)

Melatrans Sdn Bhd v Carah Enterprise & Anor [2003] 2 MLJ 193; [2003] 2 CLJ 86, FC (refd)

Walsh v Whitcomb (1797) 2 Esp 565 (refd)

Wellington Steam Ferry Company (Limited) (in liquidation) v Wellington Deposit, Mortgage, and Building Association (Limited) (1915) 34 NZLR 913, SC (refd)

Wiley as liq of United Telecasters Sydney Ltd (recs and mgrs apptd) (in liq) v Commonwealth (1996) 19 ACSR 720, FC (refd)

Wiltshire Iron Company, In re, Ex parte Pearson (1868) LR 3 Ch App 443, CA (refd)

Legislation referred to

Bankruptcy Act 1967 s 42, Schedule C

Companies Act 1948 [UK] s 227

Companies Act 1965 ss 4, 4(1), (a), (b), 218, 222, 223, 264, 291, 291(1), (2), 300, 300(1)(b)(ii), 305, 305(1)

Companies (New South Wales) Code [AU] s 368

Contracts Act 1950 s 24(a)

Insolvency Act 1986 [UK] s 127

Interpretation Acts 1948 and 1967 ss 17A, 62

National Land Code ss 254, 256, Part 16

Power of Attorney Act 1971 [UK]

Powers of Attorney Act 1949 ss 3, 3(1)(a), 3(1)(a)(i), (ii), (iii), (iv), (v), (vi), (vii), (2), 4(1), 6, 6(1), (a), 7, First Schedule, Form II

Property Law Act 1908 [NZ] s 101

Appeal from: Originating Summons No MT1–24–248 of 1997 (High Court, Shah Alam)

Bastian Pius Vendargon (YS Woo & Proctor) for the appellant.
Andrew Chiew Ean Vooi (CB Loh with him) (Lee Hishamuddin Allen & Gledhill) for the first respondent.
SS Muker (Lovelace & Hastings) for the second respondent.

Low Hop Bing JCA:

APPEAL

[1] In Shah Alam High Court Originating Summons No 24–248 of 1997 dated 13 May 1997, the appellant-plaintiff ('the borrower') sought, inter alia, a declaration that the first respondent ('the bank') was not entitled to enforce its rights under the debenture dated 10 March 1984 ('the debenture') and to sell to the second respondent ('the purchaser') seven parcels of land held under Grant Nos 10672–10678, Lot Nos 143–149, Seksyen 14, Bandar and Daerah Klang, Selangor Darul Ehsan (collectively 'the land').

[2] The High Court had dismissed with costs the borrower's originating summons. Hence, this appeal by the borrower. Submissions for all the parties herein were presented on 1 and 3 June 2010. Judgment was reserved. We have agreed to write separate judgments. This is my judgment.

FACTUAL BACKGROUND

[3] Vide letter of offer dated 16 September 1983, the bank gave an overdraft facility of RM1.5m to the borrower. By way of security, the borrower charged the land to the bank under the National Land Code ('the NLC'). The overdraft facility was also secured by a debenture which incorporated in section 6.06 thereof a power of attorney in favour of the bank ('the PA'), for valuable consideration and expressed to be irrevocable.

[4] When the borrower defaulted, the bank demanded for payment from the borrower on 24 July 1987.

[5] On 29 September 1994, at the instance of one Automotive Corp Sdn Bhd, the borrower was ordered to be wound up.

[6] On 22 March 1995, the bank gave notice of intention to sell the land to the borrower's directors and invited bids from them.

[7] On 28 April 1995, the bank issued a notice to the borrower, and took possession and control of the land.

[8] On 16 May 1995, the bank's solicitors gave notice to the borrower's solicitors stating that the bank would exercise its power to sell the land under the debenture.

[9] On 11 July 1995, the bank advertised for the sale of the land by tender. On 24 October 1995, the bank, as attorney appointed under the PA, entered into a sale and purchase agreement ('the SPA') with the purchaser for the sale of the land at RM1.9m.

[10] On 17 July 1995, the borrower's shareholders, Lim Chong Lai and Lim Chong Bean, filed Shah Alam High Court Originating Summons No 24–704 of 1995 seeking to declare the sale of the land null and void. On 29 May 1996, that originating summons was dismissed with costs. The appeal by Lim Chong Lai and Lim Chong Bean against that decision was dismissed with costs by this court.

QUESTION FOR DETERMINATION

[11] Dato' Bastian Pius Vendargo of counsel for the borrower argued that the sale of the land pursuant to the PA contained in the debenture by the bank to the purchaser when the borrower had been wound up was void, in view of s 223 of the Companies Act 1965 ('s 223') and the legal charge registered under the NLC. Support was sought in the judgment of the (then) Supreme Court in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 (SC).

[12] Mr Andrew Chiew Ean Vooi of counsel for the bank relied on the debenture, particularly the PA and responded that the sale of the land is not contrary to the NLC and the principles enunciated in *Kimlin*. He stressed that the winding up order against the borrower does not affect the validity of the PA. He referred to:

(a) *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201; [2005] 1 AMR 585 (FC);

(b) *Powers of Attorney in Australia and New Zealand* by Berna Collier and Shannon Linday, (1992), the Federation Press at pp 237–238;

(c) *Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd (in receivership) & Anor* [2000] 3 MLJ 304; [2000] 3 CLJ 127 (CA) and *Melatrans Sdn Bhd v Carah Enterprise & Anor* [2003] 2 MLJ 193; [2003] 2 CLJ 86 (FC).

[13] In response to the above submission for the bank, it was further contended for the borrower that: A

(a) s 6(1)(a) of the Powers of Attorney Act 1949 ('s 6(1)(a)') does not have an exception for survival of a PA granted by the borrower after that borrower has been wound up, relying on the words 'by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power'; and stressing that the Federal Court decision in *K Balasubramaniam* was decided wrongly, and so per incuriam; B

(b) the Malaysian position is that the donor must be a natural person, and not a company; and C

(c) s 6(1)(a) is in favour of a 'purchaser' of property, and not the bank as a lender or other category of persons.

[14] Mr SS Muker of counsel for the purchaser submitted that: D

(a) the fact that the borrower was in liquidation when the sale of the land was effected by the bank to the purchaser has no bearing on the sale itself;

(b) the sale by the bank to the purchaser was not conducted by the receivers and managers ('the R & M') and the bank had exercised a valid and irrevocable power of attorney granted by the borrower to the bank to sell the land; and E

(c) the bank was not the borrower's officer as defined in s 4(1) of the Companies Act 1965 ('s 4(1)') and is not liable to deliver up property to the liquidator under ss 300(1)(b)(ii) and 305(1) thereof ('s 300(1)(b)(ii)' and 's 305(1)' respectively). F

[15] At this juncture, I would draft the core question for determination under this head as follows: G

> Where the borrower, being a company or corporation, has created a legal charge under the National Land Code and also executed a debenture (containing a power of attorney given in favour of the bank or financial institution, for valuable consideration and expressed to be irrevocable) by way of security for a loan given by the bank or financial institution to the borrower, and the borrower has defaulted and a winding up order has been made against it, is the exercise of the power pursuant to the power of attorney for the sale of the land by the bank to the purchaser void? H

[16] The above core question crystallises and calls for an analysis of the following component issues: I

(a) The effect of s 223 and *Kimlin* on the sale of the land by the bank to the purchaser after the borrower has been wound up.

(b) The effect of the irrevocable PA.

(c) A company granting the PA.

(d) The meaning of the word 'purchaser' in s 6(1) of the PA Act 1949.

(e) The bank's capacity as the attorney in the context of ss 4(1), 300 and 305 of the Companies Act 1965.

THE EFFECT OF S 223 AND KIMLIN

[17] I would first refer to s 223 which, where relevant, reads:

> Section 223 Avoidance of dispositions of property, etc
>
> Any disposition of the property of the company including things in action ... made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[18] Section 223 was judicially considered by the (then) Supreme Court in *Kimlin* in the context of the facts there. The salient facts reveal that the borrower company ('the appellant') was the registered proprietor of certain lands ('the lands'). The appellant executed two legal charges ('the charges') under the NLC over the lands in favour of Bank Bumiputra (M) Bhd ('the first respondent') to secure banking facilities granted to the appellant. Subsequently, the appellant executed a debenture in favour of the first respondent to secure various banking facilities ('the debenture') whereby the appellant created both a fixed charge and a floating charge. The debenture provided, inter alia, for the bank to appoint the R & M who have certain powers. Subsequently, events occurred upon which the powers to appoint the R & M under the debenture became exercisable. Pursuant to such powers, the bank duly appointed the second, third and fourth respondents as the R & M of the appellant. Since there was no express provision in the debenture appointing the R & M as attorneys of the appellant, and being desirous of selling the lands without resorting to proceedings under the NLC to obtain a judicial sale, the R & M applied to the High Court by way of originating summons for leave to sell the lands ('the application'). Subsequently, the appellant went into liquidation and the application by the R & M was opposed by the liquidator.

[19] In the High Court (see *Bank Bumiputra Malaysia Bhd & Ors v Kimlin Housing Development Sdn Bhd (in receivership)* [1993] 2 MLJ 126), the learned judge held that: (a) the R & M were entitled to sell the lands which were subject to the charges, without taking proceedings under the NLC to obtain a judicial sale; and (b) the fact that a company has been put into liquidation does not affect the securities held by the R & M; at least not until the secured creditors had been fully paid off. The secured creditors could therefore dispose of the securities despite the liquidation. The trial judge further said that the R & M

were entitled to do what the debenture provided for. The liquidator, being dissatisfied with the judgment of the High Court, appealed. A

[20] The (then) Supreme Court set out two questions of law for consideration viz: B

(a) Whether the R & M were by virtue of the powers conferred upon them by the debenture entitled to sell the charged lands without taking proceedings under the NLC to obtain a judicial sale? (at p 824F).

(b) What is the impact of the winding up of the borrower company on the receivership, in particular, on the powers of sale of the R & M? (at p 824G). C

[21] Edgar Joseph Jr FCJ (as he then was) delivered judgment for the (then) Supreme Court and gave the answer to the first question in the negative ie in favour of the borrower company. D

[22] In relation to the second question, His Lordship at p 825H explained that the question for decision regarding this part of the case is, whether in Malaysia s 223 prohibits the R & M from making a valid disposition of the lands after the commencement of the winding up, and answered the question in the affirmative ie in favour of the borrower company also (at p 828E). E

[23] In my view, the judgment of the (then) Supreme Court must be seen against the factual background prevailing therein, more specifically the crucial facts which are readily distinguishable from those in the instant appeal. These crucial facts are: F

(a) the sale in question was effected by the R & M (at p 815F), whereas the sale in the instant appeal was done by the bank as attorney of the borrower pursuant to the PA; and G

(b) there was no express provision in the debenture appointing the R & M as attorneys for the borrower (at p 815G), while in the instant appeal, the debenture contains an express provision incorporating the PA clause. H

[24] Quite apart from that, it is to be noted that the two questions of law which the (then) Supreme Court was invited to determine relate to the power of sale exercised by the R & M. Those questions of law do not pertain to the power of sale by the bank as the PA holder or attorney of the borrower in the instant appeal. Be that as it may, the judgment of the (then) Supreme Court at p 823A–C reads: I

> ... no power of sale can be conferred by way of a debenture or *power of attorney or otherwise*, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself omitting all mention of notice and periods of default by a debenture or *power of attorney* and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner. (Emphasis added.)

[25] It is my respectful view that the above passage is ratio decidendi only insofar as the power of sale was exercised by the R & M appointed under a debenture. The other part of the judgment referring to 'power of attorney or otherwise' and 'power of attorney' is at best merely obiter dictum, because the questions posed therein concern the R & M only, as the debenture there does not contain a PA clause. It does not have anything to do with an attorney appointed pursuant to a PA clause in the debenture in the instant appeal. The obiter dictum does not enjoy any binding quality vis-a-vis the above question for determination in the instant appeal.

[26] As *Kimlin* is readily distinguishable on the facts and the questions of law which were focused on the power of sale exercised by the R & M only, with no express provision to appoint attorneys for the borrower company, I hold that it is of no assistance to the borrower in the instant appeal. Hence, I am unable to sustain the submission raised for the borrower on the strength of *Kimlin*.

[27] *Kimlin* has also been extensively discussed by the Federal Court in *K Balasubramaniam* where Siti Norma Yaakob FCJ (later CJ (Malaya)) commented as follows:

(a) '*Kimlin* was decided on its peculiar facts' (at p 601 line 29).

(b) 'The issue of law raised in *Kimlin* was whether a receiver and manager appointed under a debenture can proceed to sell the charged land by just obtaining the leave of the court without taking any proceedings under the Code' (at p 601 line 34–37).

(c) 'The subject matter was land charged under the Code and which the then Supreme Court held could only be sold by the receiver and manager under the provisions of the Code by way of a judicial sale' (at p 601 line 40–43).

(d) '*Kimlin* also posed the question as to whether s 223 of the Act prohibits the receivers and managers from making a valid disposition of the land after the commencement of the winding up' (at p 602 line 1–3).

(e) 'It is therefore my considered opinion that the principles of *Kimlin* should be restricted in scope and limited to the powers of the receiver and

manager appointed under a power contained in an instrument to dispose of lands charged under the Code' (at p 602 line 26–29).

[28] The above comments on *Kimlin* by Her Ladyship in *K Balasubramaniam* have tacitly lent support to my aforesaid view that *Kimlin* is of no assistance to the borrower herein.

[29] In my judgment, on the facts unfolded above, s 223 is inapplicable because the bank was exercising its right under a security when the bank sold the land. Our s 223 may be examined together with the equipollent provisions of s 368 of the Companies (New South Wales) Code. In this regard, I find support for my view in *Re Margart Pty Ltd (in liq); Hamilton v Westpac Banking Corp* (1984) 2 ACLC 709 at pp 710–712 and 714 where Helsham CJ considered s 368, in particular, the phrase 'any disposition of the property of the company'. The learned CJ of the Supreme Court of New South Wales held that s 368 was not intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when he was entitled to have them. *Re Margart* was followed by the Federal Court of Australia in *Wiley as liq of United Telecasters Sydney Ltd (recs and mgrs apptd) (in liq) v Commonwealth* (1996) 19 ACSR 720 at p 722, per Sheppard, Lindgren and Sackville JJ.

THE EFFECT OF IRREVOCABLE POWER OF ATTORNEY

[30] This issue requires a further discussion of *K Balasubramaniam*, where six questions of law were framed for determination by the Federal Court. Question 4 therein is relevant to the instant appeal and poses the issue as to the status of a power of attorney granted by a company which is subsequently wound up. In other words, where a debenture incorporates a power of attorney given by the company which has since been wound up, can such a power of attorney survive or exist or be valid and effective after the company is wound up by reason of s 4 read with ss 300 and 305?

[31] In considering the said question 4, the Federal Court referred to the New Zealand case of *Wellington Steam Ferry Company (Limited) (in liquidation) v Wellington Deposit, Mortgage, and Building Association (Limited)* (1915) 34 NZLR 913 where s 101 of the New Zealand Property Law Act 1908 (which is in pari materia with our s 6 of the PA Act 1949) was considered.

[32] Our s 6 merits reproduction as follows:

Power of attorney given for valuable consideration

6(1) *If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser —*

(a) *the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power*; and

(b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

(Emphasis added.)

[33] Siti Norma Yaakob FCJ (later CJ (Malaya)), in delivering the judgment of the Federal Court, said at p 604 line 28 to p 605 line 9:

That same issue was raised in the New Zealand case of *Wellington Steam Ferry Company (Limited) (in liquidation) v Wellington Deposit, Mortgage, and Building Association (Limited)* (1915) 34 NZLR 913 when interpreting s 101 of the New Zealand Property Law Act 1908, the provisions of which are in pari materia with our s 6 of the Powers of Attorney Act 1949. In the course of his judgment, Stout CJ posed the following question.

> The rule of law is that a power of attorney is cancelled by the death of the donor if the latter is a natural person, or by dissolution if the donor is a corporation. An exception is made to this rule by the section which is the subject matter of this summons, and the question to be determined is, does the exception apply to a power of attorney given by a corporation for valuable consideration and expressed to be irrevocable? Is such a power cancelled by the dissolution of the company, or does the section enable the power to remain operative?

After considering a number of authorities, His Lordship concluded as follows:

> I think also that these cases show that a company must on dissolution be considered as having ceased to exist for any purpose, and in the absence of special statutory provision an attorney cannot be agent of something that does not exist.
>
> From this it follows that a winding up order does not cancel a power of attorney nor does s 4 read together with ss 300 and 305 of the Act.

[34] The above passage taken from the judgment of the Federal Court in *K Balasubramaniam* is not wholly and exclusively reliant on the New Zealand case of *Wellington Steam Ferry Company*. It is also based on our own ss 4, 300 and 305. Clearly, the Federal Court judgment demonstrates that a power of attorney is not cancelled:

(a) by a winding up order; or

(b) by the combined effect of ss 4, 300 and 305.

[35] In relation to the submission presented for the borrower that the Federal Court has arrived at a wrong decision in *K Balasubramaniam*, I would take the position that it is beyond my jurisdiction to give my view as to whether the Federal Court has made a right or a wrong decision. The borrower's submission has to be brought to the appropriate forum. My duty is to identify the ratio in the judgment of the Federal Court. Having done that, it is also my duty to apply it, as it is legally binding on me. My duty is to apply the law, including case law, as it is and not what as it ought to be (see also the judgment of Clement Skinner J (now JCA) in *Chon Ah Jee @ Chuan Teck Chun & Ors v Lim Tian Huat (as the receiver and manager appointed for Bigraise Telipok Sdn Bhd) & Anor* [2010] 4 MLJ 270 at p 279 para 23; [2010] 7 AMR 584 at p 591 para 25 therein which refers to and applies the Federal Court decision).

[36] The borrower's learned counsel in relying on s 6(1)(a) was actually citing the words in the second limb thereof, and not the first limb. Upon a careful reading of the two alternative limbs in s 6(1)(a), I find that the first limb expressly prohibits the revocation of a PA without the concurrence of the donee ie the bank herein. In the absence of such concurrence which is the case in the instant appeal, the PA cannot be revoked by the borrower at all. Under the first limb, the prohibition against the revocation of an irrevocable PA appears to be absolute, and is not affected by any winding up order. Hence the PA would remain effective and enforceable at the instance of the bank.

[37] The special status of a power of attorney given as security, for valuable consideration and expressed to be irrevocable, has received well deserved attention by the learned authors of *Powers of Attorney in Australia and New Zealand*. The following passage at pp 237–238, where relevant, reads:

> An exception to the general rule that a power of attorney may be revoked at the will of the donor or terminated upon events including the mental incapacity, ... insolvency or death of the donor, is a power of attorney given as security. Such a power is sometimes also termed a power coupled with an interest or an irrevocable power. While the interest of the donee subsists, the donor cannot revoke the power without the donee's consent, and the power will continue in full force and effect notwithstanding events which would otherwise cause the power to terminate.

In most jurisdictions statutory recognition has been given to this rule. The common law position remains of residual relevance however, and of primary relevance in South Australia where the rule has not received statutory recognition.

[38] In relation to the common law position, the learned authors continued:

> The principle that an authority coupled with an interest is irrevocable except with the donee's consent has been recognized for centuries. A good definition of an irrevocable power coupled with an interest may be found in the case of *Clerk v Laurie* (1857) 2 H & N 199; 157 EQ 83:
>
> > What is meant by an authority coupled with an interest being irrevocable is this — that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable.
>
> Accordingly for a power to be irrevocable at common law, two criteria must be satisfied:
>
> (a) the power must be given for sufficient consideration or be created by deed; and
>
> (b) the power must be given for the purpose of securing some benefit to the donee.

[39] In the instant appeal, the PA was given by the borrower to the bank in consideration of the loan given by the bank to the borrower and has been created by deed. The loan has been disbursed to the borrower and the power was given for the purpose of securing some benefit to the donee ie the bank. I am of the view that the PA has indeed satisfied all the requirements for a valid PA either under the PA Act 1949 or, in any event, at common law.

[40] Further, in view of the decision of the Federal Court in *K Balasubramaniam*, I hold that the winding up order made against the borrower at the instance of Automotive Corp Sdn Bhd does not cancel the PA which the borrower has expressly granted to the bank in the debenture. The bank as attorney of the borrower under the irrevocable power of attorney is entitled to sell the land pursuant thereto, particularly pursuant to section 6.06 which reads:

Section	Power of Attorney
6.06	

	The Borrower hereby irrevocably appoints the Bank and the Manager or the officer in charge for the time being of the Bank and each of them jointly and severally to be its attorney and or attorney for it and in its name and on its behalf to do and execute any deed assurance or act which may be required or may be deemed proper on any sale or disposition by the Bank as aforesaid of any properties or assets of the Borrower under any power of sale or other disposition applicable thereto and also to do and execute all such other deeds assurances or acts as the attorney shall deem expedient in the premises.

[41] By way of illustration, the exercise of a power of attorney may be seen eg in *Melantrans Sdn Bhd*. There, the debenture also contains a validly constituted power of attorney clause which irrevocably appointed the R & M as lawful attorney of the company. The R & M entered into a sale and purchase agreement to sell a lease on behalf of the company. The Court of Appeal affirmed the High Court declaration that the sale and purchase agreement was valid and binding. The Court of Appeal decision was finally upheld by the Federal Court: see *Melatrans Sdn Bhd v Carah Enterprise & Anor* [2003] 2 MLJ 193; [2003] 2 CLJ 86 (FC).

A COMPANY GRANTING PA

[42] The borrower's submission that the donor of a power of attorney must be a natural person or individual, and not a company or corporation leads me to a discussion of s 3(1)(a) of the PA Act 1949 ('s 3(1)(a)') which, where relevant, provides that:

> (1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within Peninsular Malaysia unless (a) ... the instrument ... is authenticated in the appropriate form set out in the First Schedule hereto ...

[43] The appropriate form referred to in s 3(1)(a) is Form II in the First Schedule to the PA Act 1949 ('Form II'), which sets out the form of authentication in the case of a power of attorney executed by a company or corporation, as follows:

FORM II

FORM OF AUTHENTICATION IN CASE OF A POWER OF ATTORNEY EXECUTED BY A COMPANY OR CORPORATION

> I..... (Magistrate, Justice of the Peace, Land Administrator, Notary Public, Commissioner for Oaths, Bank Official or Advocate and Socitor of the High Court in Malaya) officiating [or practicing] at....., hereby certify that on this..... day

A of..... 20....., the common seal of (*state name of company or corporation*) was duly affixed to the above written instrument in my presence in accordance with the regulations of the said Company/Corporation.

Witness my hand..... (Emphasis added.)

B

[44] It is necessary for me to examine the effect of s 3(1)(a) and Form II in the Schedule thereto. The inclusion of a schedule(s) to an Act of Parliament has become an established legislative drafting practice, especially where specific forms are prescribed for the purpose of carrying into effect the sections set out in the main body of the Act. The schedule is clearly to be read and construed as an intrinsic, integral and operative part of the Act (see *Attorney-General v Lamplough* (1878) 3 Ex D 214 at p 229, per Brett LJ; *Craies on Statute Law*, (7th Ed) by SGG Edger, Second Indian Reprint, 2002 at pp 224–225; *Statutory Interpretation: A Code*, (3rd Ed), 1997 by Francis AR Bennion).

C

D

[45] In *Bennion on Statutory Interpretation*, (5th Ed) at p 721, the following passage is illuminating:

Section 241 The Schedule

E A Schedule is an extension of the section which induces it. Material is put into a Schedule because it is too lengthy or detailed to be conveniently accommodated in a section, or because it forms a separate document (such as a treaty).

COMMENT ON CODE S 241

F The word 'Schedule' is always given a capital S. We speak of a Schedule 'to' an Act, but a section 'of' an Act.

Reason for Schedules It is often found convenient to incorporate part of the operative provisions of an Act in the form of a Schedule. The Schedule is often used to hive off provisions which are too long or detailed to be put in the body of the Act. This does not mean they are unimportant.

G

[46] And at p 722, the relevant passage reads:

Headings Since the Schedule as a whole is annexed to the Act, it is not possible to argue that headings in the Schedule are somehow not really 'part' of it, ...

H

[47] In the instant appeal, when s 3(1)(a) and Form II are read and construed conjunctively, it becomes obvious that a company or corporation is competent to create a power of attorney, so long as the form of authentication has been meticulously complied with, as has been done in the PA herein.

I

MEANING OF 'PURCHASER' UNDER S 6(1)

[48] In my view, the borrower's submission, that the word 'purchaser' in

s 6(1) of the PA Act 1949 refers to a purchaser of property and not to a lender such as the bank or other category of persons, is a product of literal interpretation. I would construe the word 'purchaser' in accordance with the maxim, noscitur a sociis, which means it is known from its associates. This maxim allows the word to take colour and precision from the context in which it appears. The 'purchaser' in the context of s 6(1) necessarily means the purchaser of the PA with which the PA Act 1949 is concerned. The bank herein has given valuable consideration in the form of the loan which the borrower has obtained from the bank and has no doubt utilised, enjoyed and benefited from it. The bank is indeed the purchaser of the PA in which the borrower is the donor and the bank, as purchaser, subsequently becomes the donee. This construction is in complete consonance with the purposive approach which has been enacted in s 17A of the Interpretation Acts 1948 and 1967 (with effect from 25 July 1997 vide Act A996) in the following words:

> 17A Regard to be had to the purpose of the Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[49] The PA Act 1949 has been specifically enacted as an Act relating to PA. Where the requirements of the PA Act 1949 have been complied with, the purpose of the Act is to establish the validity of the PA and not to demolish it.

[50] Alternatively, in any event, even by accepting the borrower's submission that the word 'purchaser' in s 6(1) is the purchaser of property, then the sale of the land by the bank to the purchaser in the exercise of the power contained in the PA in the instant appeal comes clearly and squarely within the ambit of s 6(1)(a). Hence, the substratum of the borrower's submission is self defeating.

THE BANK AND SS 4, 300 AND 305 OF THE COMPANIES ACT

[51] As the PA is valid, the bank as the borrower's attorney does not come within the ambit of any of the provisions of s 4(1)(a) and (b) read with ss 300(1)(b)(ii) and 305(1) or a combination of these sections. Hence, the bank is not required by law to deliver up the land to the borrower under s 300(1)(b)(ii) or repay or restore the land to the borrower under s 305(1).

[52] By way of elaboration, s 4 contains the definition of words used in the Companies Act 1965. The word 'officer' is defined in s 4(1)(a) and (b) as follows:

A 4(1) In this Act, unless the contrary intention appears —

'officer' in relation to a corporation includes —

(a) any director, secretary, or employee of the corporation;

(b) a receiver and manager of any part of the undertaking of the corporation
B appointed under a power contained in any instrument.

[53] Sections 300(1)(b)(ii) and 305(1), where relevant to this appeal, read as follows:

C 300(1) Every person, who, being a ... present officer ... of a company which is being wound-up —

(a) ...

(b) does not deliver to the liquidator, or as he directs —

D (i) ...; or

(ii) all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up,

shall be guilty of an offence against this Act.

E which is punishable with imprisonment for two years or a fine of five thousand ringgit.

305(1) If in the course of winding-up it appears that ... any ... officer has misapplied or retained or become liable or accountable for any money or property of the
F company ... the court may on the application of the liquidator examine into the conduct of that ... officer and compel him to repay or restore the money or property ...

[54] The legal effect of ss 4, 300 and 305 had been discussed in great deal by
G the Federal Court in *K Balasubramaniam* and so I have nothing more to add.

CONCLUSION

[55] In the circumstances and on the foregoing grounds, I answer the above
H core question in the negative ie in favour of the bank and the purchaser. Consequently, the sale of the land by the bank to the purchaser is valid. Hence, this appeal by the borrower is dismissed with costs of RM10,000 to each respondent, after considering the submissions of learned counsel in relation to costs. Deposit to the respondent bank on account of the fixed costs.

I

Mohd Hishamudin JCA (dissenting):

[56] This is an appeal against the decision of the learned High Court judge

of Shah Alam. On 3 January 2005 the learned judge had dismissed the appellant's (the plaintiff before the High Court) originating summons application for several reliefs pertaining to the sale of the appellant's lands by the first respondent (United Malayan Banking Corp, the first defendant before the High Court) to the second respondent (Southern Realty (M) Sdn Bhd, the second defendant before the High Court). Among the reliefs prayed for is for a declaration that the sale of the appellant's lands by the first respondent to the second respondent purportedly pursuant to a debenture dated 10 March 1984 is null and void (see prayer (f) of the originating summons).

[57] I am allowing this appeal (but only confined to prayer (f)) with costs and I shall now give my reasons.

[58] I do not propose to set out the facts of the case as they have been adequately and clearly set out in the judgment of my learned brother the Hon Justice Datuk Wira Low Hop Bing JCA in his judgment. I only wish to add that the transfer of the said lands to the second respondent has not been effected due to the lodgment of caveats by the appellant and some others against the said lands.

WAS THE SALE IN CONTRAVENTION OF S 223 OF THE COMPANIES ACT 1965?

[59] My first reason for allowing the appeal is that s 223 of the Companies Act 1965 prohibits the sale of the lands in question by the first respondent to the second respondent. This is because the appellant/plaintiff, that is, the owner of the lands, had been wound up at the time of the sale. The prohibition under s 223 of the Companies Act 1965 is clear. This provision states:

> Section 223 Avoidance of dispositions of property, etc
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[60] The rationale behind this provision can be found in the landmark case of *In re Wiltshire Iron Company, Ex parte Pearson* (1868) LR 3 Ch App 443. In this case Lord Cairns LJ said that the purpose of the section is the prevention of the improper alienation and dissipation of the company's property.

[61] In the instant case it is not disputed that the appellant is the registered owner of the lands in question; that the appellant had been wound up at the time of the sale; and that no permission of the winding up court pursuant to s 223 had ever been obtained in respect of the sale.

[62] It is important to note that the provision of s 223 is widely worded and is far reaching; and it does not provide for any exception or exemption in respect of the prohibition that it stipulates.

[63] Therefore, the sale, being in contravention of a statutory prohibition, is null and void (see s 24(a) of the Contracts Act 1950).

[64] I pause here to remark that with respect this issue of s 223 of the Companies Act does not appear to have been dealt with by the learned High Court judge in his grounds of judgment although at the High Court this issue was raised.

[65] Before this court, both learned counsel for the respondents submit that the first respondent is exempted from the prohibition of s 223 by virtue of the fact that it is a secured creditor, the lands in question being charged to the first respondent under the debenture. The respondents rely on s 291 of the Companies Act read with s 42 and Schedule C of the Bankruptcy Act 1967. Section 291 states:

> Section 291 Proof of debts
>
> (1) In every winding up, subject in the case of insolvent companies to the application in accordance with this Act of law relating to bankruptcy, all debts payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.
>
> (2) Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

[66] Section 42 of the Bankruptcy Act 1967 provides:

> Section 42 Rules as to proof of debts
>
> The rules in Schedule C shall be observed with respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs and other matters.

[67] Schedule C of the Bankruptcy Act has the heading 'PROOF OF DEBTS' and has 30 paragraphs. I do not propose to set them out except three paragraphs, namely, paras 9, 10, and 11 under the subheading *Proof by Secured Creditors* that read:

> 9. If a secured creditor realizes his security he may prove for the balance due to him after deducting the net amount realized.
>
> 10. If a secured creditor surrenders his security to the Official Assignee for the general benefit of the creditors he may prove for his whole debt.
>
> 11. If a secured creditor does not either realize or surrender his security he shall state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

[68] Learned counsel for the respondents, in support of their contention, cite the Federal Court case of *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201. In this case, Siti Norma Yaakob FCJ (as she then was) in delivering the unanimous judgment of the court, said (at p 223):

> [45] The combined effect of sub-ss 291(1) and (2) of the Act and s 42 of the Bankruptcy Act 1967 and Schedule C thereto is that there is no mandatory requirement for a secured creditor to come under the liquidation. He has the option of either relying entirely on his security for which he is not obliged to submit a proof of debt. If he however decides to come under the liquidation, he submits proof of his debt and will be entitled to a dividend in respect of the unsecured portion. If he does not submit proof of his debt, then pursuant to para 16 of Schedule C, he shall be excluded from participating in a dividend.

[69] With respect to the submission of counsel, I fail to see how the provisions of the Companies Act and the Bankruptcy Act that had been referred to could be construed to exempt the first respondent from complying with s 223 of the Companies Act. All that the provisions (ie s 291(1) and (2) of the Act and s 42 of the Bankruptcy Act 1967 and Schedule C) say is that there is no mandatory requirement for a secured creditor to come under the liquidation, and that he has the option of relying entirely on his security for which he is not obliged to submit a proof of debt. There is nowhere in these provisions that states that a secured creditor is exempted from obtaining the winding up court's permission under s 223 in the event he wishes to sell the security, be it pursuant to the provisions of the debenture or pursuant to a power of attorney. On the contrary, sub-s (1) of s 291 states that that subsection must be read:

> ... subject in the case of insolvent companies to the application in accordance with this Act of law relating to bankruptcy ...

[70] The words 'this Act' refer to the Companies Act and that would include s 223 of the Companies Act; and by necessary implication sub-s (2) of s 291 must also be read subject to s 223. This means that the whole of s 291 must be read subject to the prohibition of s 223.

[71] As for the case of *K Balasubramaniam*, to my mind, on the issue of s 223 of the Companies Act, that case is irrelevant as the facts and issues of that case are not at all concerned with any allegation of disposal of property in contravention of s 223. The judgment of the Federal Court in *K Balasubramaniam* in commenting on the judgment of the Federal Court in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 was only concerned with limiting or restricting the scope of the principles enunciated by the Federal Court in *Kimlin* to the powers of receivers and managers in dealing with properties charged under the National Land Code. This is clear from the following passage in the judgment of Siti Norma FCJ (at p 222):

> [40] It is therefore my considered opinion that the principles of *Kimlin* should be restricted in scope and limited to the powers of the receiver and manager appointed under a power contained in an instrument to dispose of lands charged under the Code. Those principles have no application to assets comprised in a fixed and floating charge contained in a debenture regardless of whether such assets are moveables or immovables provided that such immovables are not charged under the Code based on the same rationale as found in *Mastiara Sdn Bhd v Motorcycle Industries (M) Sdn Bhd & Ors* [1998] 3 CLJ 874 ...

[72] In my view, the judgment of the Federal Court in *K Balasubramaniam* has no bearing whatsoever on s 223 of the Companies Act; although I do observe that Siti Norma Yaakob FCJ, in her judgment (but only as a passing remark) did take note of the fact that Edgar Joseph Jr FCJ's judgment in *Kimlin* dealt with the legality of the land transaction in that case (*Kimlin*) in the light of s 223 (see p 221 of Her Ladyship's judgment). Indeed, there is nothing in the judgment in *K Balasubramaniam* that states that a secured creditor is exempted from the prohibition of s 223. It is, however, true that the Federal Court said in *K Balasubramaniam* (in the above passage that I have just quoted) that there is no mandatory requirement for a secured creditor to come under the liquidation, but this cannot be interpreted to mean that such creditor is exempted from observing the prohibition of s 223. And for the sake of completeness I think I should also add that in *K Balasubramaniam* the subject matter is entirely different from the present case; there it involved the enforcement of an equitable charge over movable property.

[73] In my judgment, for the purpose of the interpretation and application of s 223 of the Companies Act, a case that is in point is the Federal Court case of *Kimlin* that I have just referred to earlier. Like the present case, that case

involved lands belonged to a borrower company that were charged to a bank under a debenture as well as under the National Land Code as securities for banking facilities. Like the present case the borrower company was wound up. However, unlike the present case, there, the lender bank appointed receivers and managers for the borrower company pursuant to the provisions of the debenture; whereas in the present case no receivers and managers were appointed by the lender bank although the debenture contains provisions for the appointment of receivers and managers. Also, unlike the present case, there, in that case there was no power of attorney issued to the lender bank by the borrower company; whereas in the present case there was an irrevocable power of attorney issued by the appellant/borrower company/registered landowner in favour of the first respondent/lender bank pursuant to a provision of the debenture; and the sale of the lands to the second respondent was made directly by the first respondent purportedly pursuant to this power of attorney. Further, in *Kimlin*, the lands were yet to be sold by the receivers and managers: the receivers and managers were merely contemplating to sell the lands but were unsure of their rights under the debenture; whereas in the instant case, the lands had already been sold by the lender bank. The receivers and managers in *Kimlin* being unsure of their rights to sell the lands under the terms of the debenture, accordingly, sought a declaration before the High Court that they were entitled to sell the lands without resorting to proceedings under the National Land Code to obtain a judicial sale. The liquidator of the wound up company opposed the application.

[74] At the High Court, the learned judge ruled that:

(a) by virtue of the powers conferred upon them by the debenture, the receivers and managers were entitled to sell the lands which were subject to statutory charges under the National Land Code without taking the proceedings under the National Land Code to obtain a judicial sale; and

(b) the fact that a company has been put into liquidation does not affect the securities held by the receivers and managers; at least not until the secured creditor had been fully paid off.

[75] The liquidator being dissatisfied with the judgment of the High Court appealed to the Supreme Court.

[76] At the Federal Court, the legality of the proposed sale in the light of the provision of s 223 of the Companies Act was one of the main issues that had to be determined by the court. In addressing this issue, Edgar Joseph Jr FCJ, in delivering the unanimous judgment of the Federal Court, said (at pp 825–826):

The question for decision regarding this part of the case is whether in Malaysia s 223 of the Act prohibits the receivers and managers from making a valid disposition of the lands after the commencement of the winding up.

In the present appeal, the judge in the court below answered this question in favour of the receivers and managers, being of the view that the fact that a company has gone into liquidation neither affects a secured creditor nor the securities held by them; at least, not until the secured creditor has been fully paid off. The receivers and managers, the judge said, were entitled to do what the debenture entitled them to do. The principle underlying this conclusion was that notwithstanding the liquidation which terminates the receiver's agency for the company, the receiver continued in office, had control of all or substantially all of the assets of the company and may exercise security rights for the benefit of his debenture holder by, for example, selling and conveying the company's property (see *Sowman and others v David Samuel Trust Ltd and another* [1978] 1 All ER 616). This — so the argument ran — was merely carrying into effect a disposition made by the company when it created the charge before it went into liquidation; it was a sale of property which did not belong to the company but formed part of the debenture holder's security and therefore did not require approval of the court under s 223 of the Act (see *United Malayan Banking Corporation Bhd v official receiver and liquidator of Soon Hup Seng Sdn Bhd (in liquidation) & Anor* [1986] 1 MLJ 75 applying *Sowman and others v David Samuel Trust Ltd and another*).

However, as we have said, there is an essential difference between a common law mortgage and statutory charge under the Code; and the point we should like to emphasise regarding this part of the case is that under the former, there is transfer of ownership of the mortgaged land to the mortgagee *whereas* under the latter there is none, with the charge taking effect as security only, enforceable by proceedings in court to obtain a judicial sale. It follows that in the present case, with the advent of liquidation, any sale by the receivers and managers of the lands pursuant to the debenture would be a purported sale of *property which belonged to the borrower company*, and so *would* require the approval of the court under s 223 of the Act.

[77] The words in italics in the above passage (in particular 'property which belonged to the borrower company') are the emphasis made by the Federal Court. The emphasis placed by the court is on the fact that the property in question that was intended to be sold belonged to the company that had been wound up. The Federal Court in its judgment invoked s 223 to the facts of the case. The position taken by the Federal Court was simply this; that so long as the property intended to be sold belonged to the company and that the company had been wound up, then, the approval of the High Court had to be obtained by reason of s 223; otherwise the sale would not be valid. The judgment implies that the fact that the lands were securities under a debenture, and that receivers and managers had been appointed to deal with the securities (whose agency and powers terminate upon the winding up of the borrower company), were all irrelevant for the purpose of the application of s 223.

[78] I pause at this juncture to say that, in order to fully appreciate the

judgment of the Federal Court in *Kimlin*, perhaps I should also add the folowing passage of the judgment of Edgar Joseph Jr SCJ (although I think the judicial pronouncement in this passage is more relevant to the next issue that I am going to touch on rather than on the issue pertaining to s 223:

> Because a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument is by definition (see s 4(1)(b) of the Act) an officer of the corporation — and all officers of a corporation, whether past or present, are obliged under pain of prosecution under s 300(1) of the Act, to deliver up to the liquidator appointed by the court or as he directs: (i) all the moveable and immoveable property of the corporation in his custody or under his control; or (ii) all books and papers in his custody or control belonging to the corporation, being by law required to deliver up the same (see s 300(1)(b)(i) and (ii)) — the clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding up, since there is no estate for the receiver and manager to administer. With respect, therefore, *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd* which had relied on *Sowman* must be taken to have been wrongly decided on this point as well.

[79] In the case before this court I am mindful of the fact that the sale by the first respondent was pursuant to a power of the attorney issued to them by the appellant company, and that no receivers and managers were ever appointed under the debenture; whereas in *Kimlin* the intended sale was by the receivers and managers of the borrower company (whose agency and powers terminate upon the winding up of the borrower company) and there was no power of attorney involved. In my opinion, for the purpose of s 223, it makes no difference whether it was a sale by way of a power of attorney or whether it was a sale by receivers and managers under a debenture. The point is that a sale had taken place or intended to take place. It is immaterial who did the selling and how the sale was done. What matters is that a sale of a property of a company that had been wound up had taken place without the permission of the winding up court.

[80] I must add here that in the present case, had the first respondent made the application to the winding up court for the sale of the lands, then all parties having a direct interest in the lands, such as the liquidator and the creditors, would be entitled to object to the application if any of them had a valid reason to do so. It might very well be that at the end of the day the winding up court grants the first respondent's application to sell the lands. But the point is that there is a monitoring authority in place in the form of the winding up court, and any party having an interest, and opposing the intended sale, would have had an opportunity of being heard before the proposed sale is carried out. In other words, the right to sell the lands should not be determined unilaterally by the first respondent being a party claiming to be holding the lands as securities.

[81] In my judgment, on this ground alone I ought to allow the appellant's/plaintiff's appeal.

ALTERNATIVELY, WAS THE SALE IN CONTRAVENTION OF PART 16 OF THE NATIONAL LAND CODE?

[82] However, be that as it may, there is another issue that I wish to touch upon; and that is the legal implication of the fact that the lands besides being charged under the debenture are also charged to the lender bank under the provisions of Part 16 of the National Land Code pertaining to charges. This being the factual position, the question arises: can the lender bank (the first respondent) sell the lands under the power of attorney under the debenture when the lands are at the same time charged to the lender bank under Part 16 of the National Land Code (let us put aside for the moment the issue of s 223 of the Companies Act)? To put it in another way, shouldn't the lender bank/chargee make an application for an order for sale pursuant to the provisions of the National Land Code pertaining to charges since the lands are charged to the chargee under the National Land Code, if the chargee is desirous of enforcing the securities?

[83] The learned High Court judge in his grounds of judgment states:

> I was satisfied that so long as the provisions of the debenture instrument, more so as the power of attorney was valid, and any other connected statutory requirements had been complied with, the sale thus was good without the necessity of going through the processes of a judicial sale (see *Melatrans Sdn Bhd v Carah Enterprise & Anor* [2003] 2 MLJ 193; [2003] 2 CLJ 86; *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805; [1997] 3 CLJ 274).

[84] With respect to the learned judge, in my judgment, on the authority of *Kimlin* and *Melatrans Sdn Bhd v Carah Enterprise & Anor* [2003] 2 MLJ 193 (another Federal Court judgment), when the lands, besides being charged under the debenture, are at the same time charged to the lender bank under the National Land Code, then, the provisions of the National Land Code pertaining to charges prevail over the provisions of the debenture and the power of attorney; except where, as decided by *Melatrans* (but I shall deal with *Melatrans* shortly), the sale is done by the chargor with the consent of the chargee. The rationale being that the provisions of the National Land Code pertaining to charges are meant for the protection of the chargor/landowner and hence the chargor and chargee cannot contract out of the provisions of the National Land Code pertaining to charges. In his judgment in *Kimlin*, Edgar

Joseph Jr FCJ sets out the rights of a chargor under the National Land Code (see pp 817–820). Thereafter, the learned judge proceeded to rule as follows (at p 823):

> In our view, therefore, the provisions of the Code as to the rights of chargors are design for their protection and cannot be waived; nor can the chargor contract himself out of the Code. It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner. With respect, we must therefore hold that the case of *United Malayan Banking Corporation Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (in liquidation) & Anor* [1986] 1 MLJ 75 — in so far as it decides to the contrary — was wrongly decided.

[85] In the case before this court, learned counsel for the first respondent in contending that the sale could legally be done pursuant to the power of attorney under the debenture regardless of the existence of the statutory charges under the National Land Code refers to the Federal Court case of *Melatrans Sdn Bhd v Carah Enterprise & Anor* [2003] 2 MLJ 193. In *Melatrans* the chargor landowner (the first respondent in *Melatrans*, Carah Enterprise Sdn Bhd) was not wound up. But the chargor company had executed a debenture in favour of the lender bank (the second respondent, the chargee). At the same time, the land (a leasehold) was also charged by the first respondent to the second respondent as a security. The lender bank (the second respondent) then exercised their rights under the said debenture and appointed a receiver and manager of all assets and undertakings of the first respondent. Clause 12.2 of the debenture empowered the receiver and manager to act as an agent of the first respondent (the chargor). Clause 12.2(c) further empowered him to carry out the sale of the assets secured by the debenture after taking possession of them. By cl 12.5(a), the receiver and manager was also irrevocably appointed as the lawful attorney of the first respondent (the chargor).

[86] Subsequently, the receiver and manager entered into a sale and purchase agreement with the appellant to sell the land (the lease). The appellant, however, did not wish to proceed with the said purchase on the ground that the receiver and manager did not have the power to sell the said lease by private agreement in view of the statutory National Land Code charges and the Supreme Court ruling in *Kimlin*.

[87] In response, the first respondent filed an originating summons in the

High Court for a declaration that the receiver and manager was duly empowered by the said debenture to sell the said land.

[88] The High Court granted the declaration on the grounds that the receiver and manager was the authorised agent of the company (the chargor) under the debenture and as such was authorised to enter into any sale and purchase agreement on the assets of the company; furthermore the debenture holder (the chargee) had consented to the sale.

[89] The purchaser, Melatrans Sdn Bhd (the plaintiff before the High Court), appealed to the Court of Appeal. The Court of Appeal dismissed the appeal (see *Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd (in receivership) & Anor* [2000] 3 MLJ 304; [2000] 3 CLJ 127). NH Chan JCA who was a member of the panel of the Federal Court in *Kimlin*, was a member of the panel of the Court of Appeal with Abdul Malek Ahmad JCA (as he then was) presiding and delivering the judgment of the court. In its unanimous judgment the Court of Appeal states (at p 131):

(a) in the *Kimlin* case, the chargor company was wound up and consequently, the receivers and managers ceased to be agents of the chargor company;

(b) in the present case, the chargor was not wound up;

(c) the debenture under consideration here empowers a receiver and manager appointed under the debenture to act as agent of the first respondent, in the exercise of the powers accorded to the receiver and manager under the debenture;

(d) the debenture under consideration here contains a validly constituted power of attorney clause, irrevocably appointing the receiver and manager as the lawful attorney of the first respondent;

(e) the provisions of the Code deal with the powers of a chargee to sell land charged under the Code so that any receiver and manager appointed by the creditor of the charged property must conform to the Code;

(f) at any time before an order for sale is made, a chargor can sell land charged under the provisions of the Code by way of private treaty where the proceeds of sale are sufficient to settle the outstanding debt or where the chargee consents;

(g) where an order for sale has been obtained, the charged land must be sold by public auction, subject to the right of the chargor to pay off its indebtedness to the chargee in full to the registrar of the court before the sale of the charged land, under the provisions of s 266 of the Code; and

(h) the first respondent in the present case, as the registered proprietor of the lease, is entitled to deal with the lease in such manner as a registered proprietor would, subject to the rights of the encumbrancer, namely, the second respondent.

> We hasten to add that in the *Kimlin* case, it was the borrower company that was complaining about the sale apart from being wound up whereas here it is the borrower company that is asking for the sale order and it has never been wound up.

[90] The appellant purchaser, dissatisfied with the decision of the Court of Appeal, appealed to the Federal Court. Mohamed Dzaiddin FCJ (as he then was) delivered the judgment of the Federal Court. The question for determination by the Federal Court was framed as follows:

> The question for decision was whether the learned judge was right in holding that the receivers and managers were entitled to sell the lease which was subject to the charges without taking proceedings under the NLC to obtain a judicial sale.

[91] The Federal Court answered this question in the affirmative and accordingly dismissed the appeal.

[92] The Federal Court ruled that *Kimlin* was correctly decided. The court, in its judgment, said (at pp 200–201):

> Based on the facts, the Supreme Court, after considering the 'nature and characteristics of a charge under NLC, the rights and powers incidental to such a security' (at p 817) and following *Dass on the Torrens System in Malaya* at p 429, paras 2–3, held, inter alia, as follows:
>
> (1) Under common law mortgage, the rights and powers of the mortgagee are those which are incidental to the legal or equitable estate vested in him in his role as mortgagee; whereas in the statutory charge under the NLC, the rights and powers of the chargee are not derived from such estate since none is vested in him and so his rights and powers must flow from the relevant provisions of the NLC with the charge taking effect as a security only, enforceable by proceedings in court to obtain a judicial sale.
>
> (2) The provisions of the NLC as to the rights of chargors are designed for their protection and could not be waived nor could the chargor contract himself out of the NLC. It follows, therefore, that no power of sale could be conferred by a chargor under the NLC on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the procedure laid down in the NLC. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default, by a debenture or power of attorney and the necessity for obtaining a judicial sale, would be invalid and ineffective to entitle a purchaser to be regarded as owner.
>
> (3) The provisions of NLC setting out the rights and remedies of parties under a statutory charge over land comprised in Part 16 are exhaustive and exclusive and any attempt at contracting out of those rights — unless expressly provided for in the NLC — would be void as being contrary to public policy.

Therefore, the receivers and managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without taking proceedings under the NLC to obtain a judicial sale.

[93] The Federal Court then went on to affirm the 'ratio decidendi' of the Supreme Court in *Kimlin* as follows:

> *Conclusion*
>
> From the facts in *Kimlin*, it is abundantly clear to us that the debenture dated 29 June 1985 created by the appellant in favour of the first respondent did not contain an express provision appointing the receivers and managers as attorneys of the appellant. Secondly, on 27 February 1989, the appellant went into liquidation. Hence, it was the liquidator who opposed the application for sale under the debenture in the High Court, and later caused an appeal to be brought before the Supreme Court.
>
> Thus, on the given facts, we have no reason to disagree with the ratio decidendi of the Supreme Court in *Kimlin*, except to make one observation that the Supreme Court did not consider the position of the receiver and manager as the agent of the appellant company which went into liquidation.

[94] With respect to the Federal Court, it may not be accurate to describe paras (1), (2) and (3) of the passage that I have quoted above as the ratio decidendi in *Kimlin*; for what have been set out in these three paragraphs are wider than the ratio decidendi of the judgment of the Supreme Court in *Kimlin*. In all humility I would say that perhaps it would be more accurate to refer to these paragraphs as the principles enunciated and reasoning of the Supreme Court in *Kimlin*. But putting aside for the moment the issue of terminology, it is clear from the judgment that the Federal Court in *Melatrans* endorsed the principles as enunciated by the Supreme Court in *Kimlin*.

[95] The Federal Court then made its ruling on the facts of the case before it in the following manner:

> We agree with *Kimlin* that Part 16 of the NLC deals with the rights and remedies of parties under a statutory charge over land. Section 256(2) of the NLC provides:
>
> > Any application for an order for sale under this Chapter by a *chargee* of any such land or lease shall be made to the court in accordance ... (Emphasis added.)
>
> Clearly, the section provides a prescribed method of sale to be undertaken by a chargee, not a chargor. In the instant appeal, however, the sale was undertaken by the R & M on behalf of the first respondent, the chargor of the said lease. In our view, the provisions of the NLC prescribing for judicial sale could not apply to the facts in the instant appeal because the R & M was acting as agent of the chargor.

[96] From the above passage we will observe that the Federal Court made a ruling to the effect that the sale by the receiver and manager was valid and did not contravene the National Land Code. The court noted that the debenture empowers the receiver and manager to act as the lawful attorney and agent of the first respondent (the borrower/chargor) and to exercise the powers accorded under the debenture. Since the sale was carried out by the receiver and manager as the agent of the borrower company/chargor, the sale was deemed by the court to have been effected by the chargor. The court ruled that where the sale is by the chargor and the chargee consents to the sale, the sale is valid although it is not a judicial sale under the National Land Code.

[97] We will observe that, in arriving at the above decision, the Federal Court in *Melatrans* had distinguished *Kimlin*. According to the judgment of the court in *Melatrans*, in *Kimlin* the sale was intended to be effected by the chargee and not by the chargor. This is because (according to the Federal Court in *Melatrans*) the receivers and managers in *Kimlin*, by reason of the winding up of the chargor company, had ceased to be the agents of the chargor company; and, instead, they became the agents of the chargee (the lender bank). Moreover, in *Kimlin* the debenture did not contain an express clause appointing the receivers and managers as attorneys of the chargor company.

[98] Having analysed the judgment of the Federal Court in *Melatrans*, I shall now revert to the facts of the present case, and I shall pose the following pertinent question: in the present case, was the sale undertaken or effected by the *chargee* (the lender bank, United Malayan Banking Corp/the first respondent)? or, was the sale effected or undertaken by the chargor (the appellant/borrower company, Lim Eng Chuan Sdn Bhd)? It is to be recalled that under the debenture a power of attorney had been issued by the chargor in favour of the chargee; and it is to be noted that the sale and purchase agreement with the second respondent (the purchaser, Southern Realty (M) Sdn Bhd) was signed by an officer of the chargee bank as an attorney of the chargor pursuant to the power of attorney, and the chargor was named in the agreement as the vendor. If the sale is regarded as having been undertaken or effected by the chargee then, on the authority of *Kimlin* and *Melatrans*, the sale was void as it contravened the National Land Code because the sale was not a judicial sale carried out in accordance with Part 16 of the National Land Code. But, on the other hand, if the sale is considered to have been undertaken or effected by the chargor (with the consent of the chargee) then on the authority of Melatrans, the sale is valid as such a sale need not have to be a judicial sale under the National Land Code. In other words, the sale could be done by way of a private treaty. In the present case, in my judgment, although there is the power of attorney, and that the sale and purchase agreement named the chargor as the vendor, nevertheless, it is unrealistic and unfair to regard the sale as a sale undertaken or effected by the chargor. In the present case, it is the chargee bank

who is desirous of enforcing the security and who gave notice to the chargor's solicitors stating that the bank would exercise its powers to sell the lands under the debenture. It is the chargee bank that subsequently took out the advertisement. It is the chargee bank who gave notice of its intention to sell the lands to the chargor's directors; and it is the chargee bank that issued a notice to the chargor and took physical possession of the property pursuant to cl 6.02(a) of the debenture. Indeed, it was the chargee's officer who signed the sale and purchase agreement. Furthermore, in the present case, there is no involvement of any intermediary such as a receiver and manager. And an important factor to note is that the relationship between the donor of the power of attorney and the donee of the power of attorney is not merely that of a normal agency. The relationship is deeper than that. In the present case the power of attorney is a security and the donee/chargee, as agent, had used the authority under the power of attorney not for the benefit of their principal, the donor/chargor, but for their own benefit to achieve the objective of the debenture arrangement between the donor/chargor and the donee/chargee. Therefore, in fact and in law the sale must be deemed to have been effected or undertaken by the chargee rather than by the chargor. It was only a legal formality that the chargor was named as the vendor in the sale and purchase agreement as the sale was made pursuant to the power of attorney. Since the sale was undertaken or effected by the chargee and not by the chargor then legally it should have been effected in accordance with the provisions of the National Land Code pertaining to the charges. In other words, there should have been a judicial sale. Since the sale was not a judicial sale under the Code, therefore, the sale was invalid.

IS THE PRINCIPLE ENUNCIATED IN *KIMLIN* IN RELATION TO PART 16 OF THE NATIONAL LAND CODE MERE OBITER DICTA IN SO FAR THE PRINCIPLE RELATES TO A SALE PURSUANT TO A POWER OF ATTORNEY?

[99] With respect, I accept the submission of the respondents that the principle enunciated in *Kimlin* is mere obiter dicta in so far as the principle seeks to encompass a sale under a power of attorney since in *Kimlin* the sale was not intended to be effected pursuant to a power of attorney and indeed there was no power of attorney involved in *Kimlin*. In this regard, it is to be recalled that in *Kimlin* the Federal Court said:

> It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or *power of attorney* or otherwise, but proceedings must be brought by the chargee to obtain judicial sale in accordance with the rigid procedure laid down in the Code. (Emphasis added.)

[100] Be that as it may, in my view, the *Kimlin* principle is not only sound but is also of persuasive authority since it emanates from the highest court, and

hence we ought to respect and abide by such principle. In the light of the rationale behind the principle (namely the protection of chargors by the National Land Code), the principle does not make sense if a sale under a power of attorney is exempted from its application. It is also to be appreciated that the *Kimlin* principle is approved by the Federal Court in the later case of *Melatrans* and accorded respect and recognition in *K Balasubramaniam*. Therefore, the issue as to whether the *Kimlin* principle is obiter dicta or ratio decidendi in so far as it relates to a power of attorney is merely academic.

WAS THE IRREVOCABLE POWER OF ATTORNEY ISSUED BY THE CHARGOR (THE APPELLANT) IN FAVOUR OF THE CHARGEE (THE FIRST RESPONDENT) UNDER THE DEBENTURE, AS A MATTER OF LAW, AUTOMATICALLY REVOKED ONCE THE CHARGOR COMPANY WAS WOUND UP?

[101] It is my judgment that this issue is now academic in the light of my rulings on the above two issues. However, since on this important issue the Powers of Attorney Act 1949 does not provide a clear answer, and there is a dearth of local authority on the issue, I shall endeavour to answer this question.

[102] To begin with, I have no difficulty in rejecting the submission of learned counsel for the appellant, Dato' Bastian Vendargon, that the Powers of Attorney Act only applies to natural persons and not to corporations or companies. This is because the words 'A COMPANY OR CORPORATION' can be found in Form II of the First Schedule to the Act.

[103] However, there is the alternative submission by Dato' Bastian Vendargon that the power of attorney issued to the donee/first respondent was automatically revoked or cancelled once the donor/appellant company was wound up under s 218 of the Companies Act. He refers to s 6 of the Powers of Attorney Act 1949 and the New Zealand case of *Wellington Steam Ferry Company (Limited) (in liquidation) v Wellington Deposit, Mortgage, and Building Association (Limited)* (1915) 34 NZLR 913.

[104] Learned counsel for the respondents (Encik Chiew Ean Vooi and Encik SS Muker), on the other hand, submit that the power of attorney survives the winding up as the power of attorney is part of a security for money, citing *K Balasubramaniam*; *Walsh v Whitcomb* (1797) 2 Esp 565; and *Powers of Attorney in Australia and New Zealand* by Collier and Lindsay, (1992), the Federation Press at pp 237–238.

[105] The learned High Court judge in his judgment ruled that the power of

attorney was not cancelled by the winding up order. The learned judge based his ruling on *Wellington Steam Ferry Company* and *K Balasubramaniam*.

[106] Section 6(1)(a) of the Powers of Attorney Act provides:

> Section 6 Powers of attorney given for valuable consideration
>
> (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser —
>
> (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and
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> (b) any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor, had not been done or had not happened; and
>
> (c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.

[107] Dato' Vendargon submits that the winding up of a company is not among the exceptions enumerated in s 6 of the Powers of Attorney Act. Therefore (so he contends), the implication is that a winding up of a company is not saved by the exceptions under s 6; and this means that on the authority of *Wellington Steam Ferry Company* a winding up of a company revokes or cancels a power of attorney issued by the company.

[108] What actually is the ruling in *Wellington Steam Ferry Company*? There is no difficulty in understanding the judgment of the New Zealand Supreme Court. The judgment is brief and clear. There is no ambiguity. The issue is quite simple. In this New Zealand case, the plaintiff company had issued to the defendant company, a purchaser, a power of attorney for valuable consideration. The power of attorney was expressed to be irrevocable. What happened was, prior to the execution of this power of attorney, the plaintiff company had sold several parcels of land to various persons, but the time for the purchasers to complete the payments was not due yet. Subsequently, the plaintiff company sold to the defendant the contracts made by it with the purchasers, and received payment from the defendant. The agreement between the plaintiff and the defendant stipulates that the plaintiff sold and the defendant purchased all 'the amounts payable under the said agreement for sale and purchase, together with all the estate, interest, and rights of the vendor and

the liquidators in or under the said agreements and in the lands the respective subject-matters thereof'. An irrevocable power of attorney was given by the plaintiff company to the defendant company. This power of attorney empowers the defendant to convey the legal estate in the several parcels of land described in the power of attorney to the several purchasers named therein. However, before the defendant could do the conveyance of the several parcels to the respective purchasers, the plaintiff company went into liquidation. The plaintiff company made an application to the court for a declaratory order to determine as to whether the dissolution of the plaintiff company (the donor) following the winding up would affect the powers of the defendant company (the donee) under the power of attorney.

[109] Subsection (1) of s 101 of the Property Law Act of New Zealand are in pari materia with s 6 of our Powers of Attorney Act.

[110] In *Wellington Steam Ferry Company* the learned judge, Stout CJ, posed the issue before him in the following manner:

> An irrevocable power of attorney was given by the plaintiff company to the defendant company, and the question is, if the plaintiff company is dissolved, can the defendant, in the name of the plaintiff company, convey the parcels of land agreed to be sold to the purchasers? It is clear that this could be done if the plaintiff company was a person because of the provisions of the section. But can the defendant do so if the company is dissolved?

[111] The ruling of the court is two-fold. Firstly, Stout CJ ruled that a corporation does not come within the ambit of s 101. In other words, the dissolution of a company does not come within any of the exceptions as provided for by s 101. This means that whatever legal consequences as governed by the general principles of common law with regard to the dissolution of a company would apply. In the words of the learned Chief Justice:

> In my opinion it cannot be said that the wording of this section is consistent with interpreting the word 'donor' as including a corporation. The words used exclude such a meaning. Reading them in their natural signification they cannot be said to be applicable to a company. The section is dealing with persons who may die, marry, become insane or bankrupt. A company can do none of these things. There are no words that can be said to refer to companies. There is no apt word which can be applied to the ceasing of a company on dissolution. All the words that refer to a change can only have reference to a natural person.

[112] Secondly, Stout CJ ruled that the power of attorney was cancelled by the dissolution of the plaintiff company. The learned Chief Justice said:

> The rule of law is that a power of attorney is cancelled by the death of the donor if the latter is a natural person, or by the dissolution if the donor is a corporation. An exception is made to this rule by the section which is the subject-matter of this summons, and the question to be determined is, Does the exception apply to a power of attorney given by a corporation for valuable consideration and expressed to be irrevocable? Is such a power cancelled by the dissolution of the company, or does the section enable the power to remain operative?

[113] And the learned Chief Justice concluded his judgment as follows:

> I think also that these cases show that a company must on dissolution be considered as having ceased to exist for any purpose, and in the absence of special statutory provision an attorney cannot be agent of something that does not exist.

[114] In so ruling, the learned Chief Justice was applying the common law. But the important to note that Stout CJ treated the power of attorney before him as creating merely a normal principal-agent relationship situation. Since the learned Chief Justice had deemed the power of attorney in the case before him as creating merely a normal agency, his ruling is consistent with the principles of common law pertaining to a normal agency. According to *Bowstead and Reynolds on Agency*, (18th Ed), 2006 at para 10-015, under the common law of agency, the actual authority of an agent, whether conferred by deed or not and whether expressed to be irrevocable or not, is terminated by the death or mental incapacity of the principal or the agent, or where the principal or agent is a body corporate, by its winding up or dissolution.

[115] However, at common law, in a situation such as that of our case, where the authority of an agent is given by deed for valuable consideration for the purpose of supporting or effecting a security, the common law rule is different: it is irrevocable during the subsistence of the security. The common law rule is explained by *Bowstead and Reynolds on Agency* as follows:

> … a grant of authority is of its nature revocable. The mere fact that a power is declared in the instrument granting it to be irrevocable does not make it so, even if that instrument is a deed. Authority can be irrevocable; but this is only where the notion of agency is employed as a legal device for a different purpose from that of a normal agency, to confer a security or other interest on the 'agent'. In such a case it is intended that the agent use the authority not for the benefit of his principal but for his own benefit, to achieve the objects of the arrangement.
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> The cases from which this rule is derived, in particular dicta of Lord Kenyon in *Walsh v Whitcomb* (1797) 2 Esp 565 and the decision in *Smart v Sanders* (1848) 5 CB 895 in the context of factors, in 1848, go back to a time of what one might call experimentation between legal doctrines (not all of which survive) ....
>
> The orthodox contemporary position is that authority is irrevocable where it accompanies a security or proprietary interest and is part of it or a means of achieving it. The fact that the agent subsequently acquires an interest in the property

is irrelevant: the authority must be conferred as part of, or as protection of, the agent's interest. The authority is referred to as 'authority' or 'power' 'coupled with an interest', a phrase not unconnected with the 19th century notion in a different context of a license coupled with an interest. The mere right to earn a commission is not such an interest; nor is an agent's lien, unless the power was conferred specifically to protect it or sums due under it. As already stated, this is different from normal agency, in which the agent must act in the interests of the principal: here the agent acts in his own interests. Agency is here a device for supporting or conferring a proprietary interest (a power of attorney to sue on another's behalf and a power of sale are ways of enforcing a security). (See *Bowstead & Reynolds on Agency*,18th edn, 2006, p. 606, para 10-007.)

[116] And more relevant for our purpose is the further principle of common law that such an irrevocable authority as referred to above is not cancelled or revoked by the death, mental capacity or insolvency of the principal, nor, where the principal is a body corporate, by its winding up or dissolution. The rationale for this rule is that what is in issue is a proprietary right, which once granted, is unaffected by loss of capacity of the grantor (see *Bowstead and Reynolds on Agency*, (18th Ed), 2006 at p 607, para 10-007).

[117] Therefore, based on the above principles of common law the winding up of the appellant company does not revoke or cancel the power of attorney granted to the first respondent because the power of attorney in the present case is not for the purpose of a normal agency but is given for the purpose of supporting or effectuating a security.

[118] Reverting to Dato' Vendargon's submission on s 6 of our Powers of Attorney Act, it is my judgment that on the authority of *Wellington Steam Ferry Company*, the word donor in s 6 of the Act does not include a company. To this extent the New Zealand case support his submission, but only partially. However, with respect, I hold that Stout CJ's judgment does not support Dato' Vendargon's contention that the power of attorney in the present case is revoked or cancelled upon the winding up of the appellant company. For Stout CJ treated the power of attorney before him as creating a normal agency; whereas the power of attorney in our case is an authority or power couple with an interest, a security.

[119] Thus the answer to this problem about the effect of a winding up on a power of attorney, where the donor is a company, cannot be found in s 6 of the Powers of Attorney Act. It is found elsewhere, and it is in the common law. This is not a satisfactory state of affairs as far as our legislation on powers of attorney is concerned. If I may respectfully say an urgent legislative intervention is warranted considering that powers of attorney are important instruments in the daily life of the commercial world and there must be certainty in the law relating to the subject.

[120] But as I have said earlier this issue is now academic. In the present case, it is immaterial that the power of attorney given to the first respondent survives the winding up of the appellant. The purported sale of the lands by the first respondent to the second respondent is still invalid since the sale contravenes s 223 of the Companies Act or, alternatively, it contravenes as Part 16 of the National Land Code.

[121] Finally, there is this question as to whether the judgment of the Federal Court in *K Balasubramaniam* on this issue of the validity of the power of attorney is per incurium, as submitted by Dato' Vendargon? In *K Balasubramaniam* the court said (at pp 223–224):

> [46] Question 4 poses the issue as to the status of a power of attorney granted by a ccompany which is subsequently wound up. That same issue was raised in the New Zealand case of *Wellington Steam Ferry Company (Limited) (in liquidation) v Wellington Deposit, Mortgage, and Building Association (Limited)* (1915) 34 NZLR 913 when interpreting s 101 of the New Zealand Property Law Act 1908, the provisions of which are pari materia with our s 6 of the Powers of Attorney Act. In the course of his judgment, Stout CJ posed the following question:
>
> The rule of law is that a power of attorney is cancelled by the death of the donor if the latter is a natural person, or by the dissolution if the donor is a corporation. An exception is made to this rule by the section which is the subject matter of this summons, and the question to be determined is, Does the exception apply to a power of attorney given by a corporation for valuable consideration and expressed to be irrevocable? Is such a power cancelled by the dissolution of the company, or does the section enable the power to remain operative?
>
> [47] After considering a number of authorities His Lordship concluded as follows:
>
> I think also that these cases show that a company must on dissolution be considered as having ceased to exist for any purpose, and in the absence of special statutory provision an attorney cannot be agent of something that does not exist.
>
> [48] From this it follows that a winding up does not cancel a power of attorney nor does s 4 read together with ss 300 and 305 of the Act.

[122] With the greatest respect to the Federal Court and in all humility I accept the submission of Dato' Vendargon that there is here, unfortunately, an inadvertent misreading of the judgment of Stout CJ by the Federal Court; for the learned Chief Justice of New Zealand had said:

> an attorney cannot be agent of something that does not exist.

[123] The Federal Court in looking for a principle and authority to resolve

the issue at hand had placed reliance solely on this Supreme Court of New Zealand case. But, unfortunately (again with the greatest respect and in all humility), it misunderstood the judgment of Stout CJ. For, as I have pointed out earlier, Stout CJ's concluding remark was exactly the opposite to what the Federal Court took it to mean. This means that had the Federal Court understood the judgment correctly, the decision of the court would have been otherwise. In the circumstance I have to agree with learned counsel that this part of the judgment at para [48] is per incurium. However, it is a great relief on my part that, since in the present case the Federal Court and I, in the final result, share the same view on the validity of the power of attorney in spite of the winding up order (though our reasoning differs), therefore, the question of my judgment not following a per incurium judgment of a higher court does not arise.

[124] In conclusion I allow the appeal (with costs) but only to the extent of allowing prayer (f).

Zaharah Ibrahim JCA:

[125] This is an appeal by the appellant against the decision of the High Court in Malaya at Shah Alam given on 3 January 2005 dismissing the appellant's application made by way of Originating Summons No MT1–24–248 of 1997 ('the originating summons').

[126] By the originating summons the appellant sought against the respondents:

(a) an order and declaration that the first respondent was not entitled, after 23 July 1993 to enforce their rights under the debenture dated 10 March 1984 ('the debenture') executed by the appellant in favour of the first respondent as the first defendant's rights under the debenture was time barred;

(b) an order and declaration that, consequently, the first respondent was not entitled to execute the sale and purchase agreement dated 24 October 1995 ('the SPA') as attorney of the plaintiff to the second respondent pursuant to a power of attorney clause contained in the debenture in regard to the sale of land held under Grant Nos 10672–10678, Lot Nos 143–149, Section 14, Town and District of Klang, Selangor ('the land');

(c) an order and declaration that the sale of the land to the second respondent pursuant to the SPA be declared null and void and of no further effect;

(d) an order and declaration that the SPA be declared null and void on the

ground that on the date of the SPA the appellant had been wound up and any sale subsequent to such winding up was ultra vires ss 222 and 223 of the Companies Act 1965;

(e) an order and declaration that the sale of the land be set aside as the first respondent had failed to sell the land at the market value;

(f) an order and declaration that since the land was charged to the first respondent under the National Land Code, the first respondent was not entitled to sell the land under the debenture; and

(g) an order and declaration that the sale of the land be declared null and void as the first respondent had failed to appoint a receiver and manager under the debenture.

BRIEF BACKGROUND FACTS

[127] The first respondent granted an overdraft facility to the appellant. To secure the repayment of monies lent under the facility, the appellant charged the land to the first respondent and that charge was registered under the National Land Code.

[128] The appellant also executed the debenture in the first respondent's favour. The debenture contains an irrevocable power of attorney clause.

[129] The appellant failed to repay the overdraft facility.

[130] On 29 September 1994 an order winding up the appellant ('the winding up order') was granted on a petition presented by one Automotive Corp Sdn Bhd.

[131] On 24 October 1995, utilising the power of attorney in the debenture, the first respondent entered into the SPA for the sale of the land to the second respondent.

[132] On 4 November 1996, the appellant obtained a stay of the winding up order.

GROUNDS OF APPEAL

[133] The memorandum of appeal contains several grounds. However, in the midst of his submissions, counsel for the appellant informed the court that he was not pursuing the issue of limitation of time nor the issue of undervalue of the land.

[134] As such only the following three grounds of appeal remained to be considered: A

(a) that the sale of the land by utilising the power of attorney was void as a power of attorney does not survive a winding up (*ground (a)*);

(b) that the sale of the land by the first respondent by utilising the debenture and/or the power of attorney was ultra vires the National Land Code as the land was charged under the Code (*ground (b)*); and B

(c) that the sale of the land by the first respondent to the second respondent was void in view of s 223 of the Companies Act 1965 (*ground (c)*). C

[135] The three grounds will be dealt with in the above order, not in the order that they were argued before this court.

Ground (a) D

[136] Learned counsel for the appellant argued that a power of attorney does not survive a winding up. As authority for this, the court was referred to s 6 of the Powers of Attorney Act 1949 ('POA Act') which is substantially the same as s 101 of the New Zealand Property Law Act 1908. E

[137] Section 101 of the New Zealand Property Law Act 1908 was considered in the case of *Wellington Steam Ferry Company (Limited) (in liquidation) v Wellington Deposit, Mortgage, and Building Association (Limited)* (1915) 34 NZLR 913 ('*Wellington Steam Ferry* case'). That case was referred to and accepted by the Federal Court in *K Balasubramaniam, liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v MBf Finance Bhd & Anor* [2005] 2 MLJ 201 ('*Balasubramaniam*'s case') as authority for the proposition that a power of attorney survives a winding up. F G

[138] Learned counsel for the appellant submitted that the Federal Court in *Balasubramaniam*'s case misread the decision in the *Wellington Steam Ferry* case and that the court in the *Wellington Steam Ferry* case in fact held the view that a power of attorney does not survive a winding up. H

[139] In the course of his submission that a power of attorney does not survive a winding up, learned counsel for the appellant came up with the startling proposition that the POA Act does not apply to corporations. Counsel for the appellant drew the court's attention to the United Kingdom's Power of Attorney Act 1971 which specifically provides that a power of attorney may be granted to a company or an individual. Our POA Act does not have a similar express provision. Neither does s 101 of the New Zealand Property Law Act 1908. I

[140] It was also argued that the POA Act, and in particular s 6 of the Act, only applies in favour of purchasers, not lenders or debenture holders such as the first respondent.

[141] There are thus three aspects of the POA Act that need to be considered:

(a) whether the appellant is right in its argument that the POA Act does not apply to corporations;

(b) whether the benefit of s 6 of the POA Act is given only to purchasers; and

(c) whether a power of attorney survives a winding up.

Whether the POA Act applies to corporations

[142] The applicability of the POA Act to corporations has not been shown to have been an issue before this. Its applicability to corporations has been accepted by various courts including the appellate courts. *Balasubramaniam*'s case is one example. Another is the Federal Court decision in *Melatrans Sdn Bhd v Carah Enterprise & Anor* [2003] 2 MLJ 193 ('*Melatrans*' case') where the Federal Court stated that it was satisfied the power of attorney in the debenture had complied with sub-ss 3(2) and 4(1) of the Act.

[143] It was argued for the first respondent that s 3 of the POA Act, read together with the First Schedule to the POA Act, clearly permits powers of attorney to be given by a corporation.

[144] Learned counsel for the appellant submitted that a statute must be read in its entirety for its true effect. I can find no fault with that submission.

[145] Now, if one were to read the POA Act in its entirety, it would be clear that it does not deal with the question of *who* can grant a power of attorney.

[146] However, para 3(1)(a) of the POA Act, read together with sub-s 3(2), states in no uncertain terms that an instrument purporting to create a power of attorney after the commencement of the POA Act in Peninsular Malaysia is not valid unless two conditions are met, namely:

(a) it is executed before any of the persons specified in subparas 3(1)(a)(i)–(vii) of the POA Act; and

(b) it is authenticated in the appropriate form set out in the First Schedule to the POA Act.

[147] The use of the appropriate form is therefore not an option. Neither are

the forms mere examples. The First Schedule contains two forms. The second form, Form II, is a form for authentication in case a power of attorney is executed by a company or a corporation.

[148] Deviations from the forms which have no substantial effect and are not calculated to mislead do not of course invalidate the forms. This is clear from s 62 of the Interpretation Acts 1948 and 1967 (Act 388). However, the fact remains that a specific form is prescribed for a power of attorney executed by a company or a corporation, the non-use of which would render the instrument invalid.

[149] I therefore agree with counsel for the first respondent that s 3 of the POA Act, read together with the First Schedule to the Act, shows that the POA Act applies to corporations.

[150] The basis of the appellant's contention that the POA does not apply to corporations is mainly s 6 of the POA Act and the judgment of Stout CJ in the *Wellington Steam Ferry* case.

[151] In discussing s 101 of the New Zealand Property Law Act 1908, which is substantially the same as s 6 of the POA Act, Stout CJ said at p 915:

> The rule of law is that a power of attorney is cancelled by the death of the donor if the latter is a natural person, or by dissolution if the donor is a corporation. An exception is made to this rule by the section which is the subject matter of this summons, and the question to be determined is, Does the exception apply to a power of attorney given by a corporation for valuable consideration and expressed to be irrevocable? Is such a power cancelled by the dissolution of the company, or does the section enable the power to remain operative?

[152] What is eminently clear is that all that the judgment says is that s 101 of the New Zealand Property Law Act 1908 does not operate to 'save' a power of attorney from being cancelled in the event that a corporation is dissolved. If that judgment is to be applied in the context of s 6 of the POA Act, all that one will be able to say is that s 6 of the POA Act does not operate to 'save' a power of attorney granted by a corporation in the event that the corporation is dissolved.

[153] As that judgment does not deal with the POA Act, and especially not with s 3 of the Act read together with the First Schedule to the Act, that judgment of Stout CJ cannot be authority for saying that the POA Act does not apply to a power of attorney granted by a corporation, much less that a power of attorney cannot be granted by a corporation.

Whether the benefit of s 6 of the POA Act is given only to purchasers

[154] The introductory part of sub-s 6(1) of the POA Act reads as follows:

> 6(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in *favour of a purchaser*. (Emphasis added.)

[155] The same emphasised words appear in s 7.

[156] Section 6 (and s 7) of the POA Act are clearly meant to protect those who purchase property from a donee of a power of attorney. A purchaser, having satisfied himself/itself that the seller has the power under an irrevocable power of attorney given for valuable consideration, should not be constantly worrying that the sale could become frustrated because the power of attorney is revoked or renounced by the donor, or the donor dies, marries, becomes unsound of mind or mentally disordered or bankrupt. In that context, it is true that the benefit of s 6 (and s 7) is given to purchasers.

[157] In the context of the case before us, the benefit of s 6 is therefore given to the second respondent as the purchaser under the SPA executed pursuant to the irrevocable power of attorney under the debenture. In other words, the sale of the land by the first respondent (the donee) would continue to be valid in the second respondent's favour notwithstanding anything done by the appellant (the donor) without the concurrence of the first respondent.

[158] This brings us to the question of whether the power of attorney under the debenture survived the appellant's winding up.

Whether a power of attorney survives a winding up

[159] This question has been answered in the affirmative by the Federal Court in *Balasubramaniam*'s case. This court was urged by the appellant to find that the Federal Court had erred in its finding. With respect, this court is not in a position to do that.

[160] Counsel for the appellant submitted that the Federal Court in *Balasubramaniam*'s case had misread the judgment in the *Wellington Steam Ferry*'s case. Stout CJ's view in that case is that s 101 of the New Zealand Property Law Act 1908 does not provide the exception to the common law rule that a power of attorney does not survive the *dissolution* of a corporation.

[161] As was submitted by counsel for the first respondent, a company

which is wound up is not yet dissolved. It is only upon the completion of the process of winding up that a company can be ordered to be dissolved, and is only dissolved upon such dissolution order being made by the court under the Companies Act 1965.

[162] In the case before us, the SPA was entered into after the appellant was wound up, but before its dissolution. The power of attorney under the authority of which the SPA was entered into by the first respondent with the second respondent was therefore still in full force.

Ground (b)

[163] The second ground raised by the appellant was that the sale of the land was ultra vires the National Land Code as the land was charged and the charge registered under the National Land Code yet the sale was done using the power of attorney in the debenture.

[164] The appellant relied on the Federal Court decision in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 ('*Kimlin*'s case').

[165] It must be recognised that the facts in *Kimlin*'s case are not the same as the facts in the case before this court. In *Kimlin*'s case, the debenture did not contain a power of attorney. It was for that reason that the receivers and managers made the application for leave to the court to sell the property in question.

[166] In the case before this court, there was a power of attorney which was given to the first respondent itself. The power of attorney is in section 6.06 of the debenture, and is as follows:

> The Borrower hereby irrevocably appoints the Bank and the manager or the officer in charge for the time being of the Bank and each of them jointly and severally *to be its attorney and or attorney for it and in its name and on its behalf* to do and execute any deed assurance or act which may be required or may be deemed proper on any sale or disposition by the Bank or by any Receiver and or Manager as aforesaid of any properties or assets of the Borrower under any power of sale or other disposition applicable thereto and also to do and execute all such other deeds assurances or acts as the attorney deem expedient in the premises. (Emphasis added.)

[167] That power of attorney must be read, for the purpose of the sale of the land, with section 6.02(a) and section 6.05 of the debenture.

[168] Section 6.02(a) empowers the first respondent to enter the land and

take possession of it upon the moneys secured by the debenture becoming immediately repayable. Section 6.05 empowers the first respondent to sell the land after it takes possession of the land under section 6.02(a) and after giving not less than 24 hours' notice to the appellant. These are powers given to the first respondent itself and are independent of the powers granted under Sections 6.03 and 6.04 to any receivers and/or managers that the first respondent may appoint.

[169] By virtue of the power of attorney in section 6.06 of the debenture, in executing the SPA for the sale of the land to the second respondent, the first respondent was acting for and on behalf of the appellant who was the chargor. In other words, the first respondent (the chargee) was acting as agent for the chargor.

[170] The first respondent contended that ss 254 and 256 of the National Land Code do not apply when the sale of the charged land is by the chargor as those provisions in the National Land Code are meant for situations where the sale is being undertaken by the chargee. In support of that contention the first respondent referred the court to the decision of the Federal Court in *Melatrans*' case.

[171] In *Melatrans*' case, the sale of the charged land by the receiver and manager acting under a power of attorney similar to the one given to the first respondent in the case before this court was challenged by the liquidator of the borrower company (the chargor). The Federal Court held that the provisions of the National Land Code setting out the method for judicial sale of land which was subject to a charge registered under that Code did not apply because, in that case, the receiver and manager was acting as agent of the chargor.

[172] As the first respondent here was exercising the power of attorney granted under section 6.06 of the debenture, it was acting on behalf of and as agent for the appellant (the chargor). Based on *Melatrans*' case, the provisions of the National Land Code in Part 16, Chapter 3, do not therefore apply.

[173] There is no dispute that on the date the SPA was entered into, the winding up order was still in force.

[174] The appellant submitted, based on s 223 of the Companies Act 1965 and *Kimlin*'s case, that the sale of the land by the first respondent to the second respondent was void as leave was not obtained from the court for such sale.

[175] The first respondent's position (as was the second respondent's) was that as the sale was done under a power of attorney, that sale was unaffected by

the winding up order. Reliance was placed on the decision in *Melatrans*' case both at the Federal Court and at the Court of Appeal.

[176] As has been discussed above, the power of attorney given by the appellant to the first respondent in the debenture was still valid when the SPA was executed as the power of attorney survived the winding up order.

[177] As the land was held by the first respondent as security for the facility granted to the appellant, the first respondent was without a doubt a secured creditor of the appellant.

[178] The general purpose of s 223 is to enable all the assets of the company under liquidation to be distributed pari passu as required by s 264 of the Companies Act 1965.

[179] In *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814; [1980] 1 WLR 711 Buckley LJ in the English Court of Appeal stated, among others, that:

> It is a basic concept of our law governing the liquidation of insolvent estates, whether in bankruptcy or under the Companies Acts, that the *free assets* of the insolvent at the commencement of the liquidation shall be distributed rateably amongst the insolvent's *unsecured creditors* as at that date. In bankruptcy this is achieved by the relation of the trustee's title to the bankrupt's assets back to the commencement of the bankruptcy. In a company's compulsory winding up it is achieved by s 227. (Emphasis added.)

[180] This principle was restated by the English Court of Appeal in the case of *Denney v John Hudson & Co Ltd* [1992] BCLC 901; [1992] BCC 503.

[181] Section 227 referred to in Buckley LJ's judgment quoted above is s 227 of the English 1948 Companies Act. That section has been re-enacted as s 127 of the English Insolvency Act 1986. Those sections are substantially the same as s 223 of our Companies Act 1965.

[182] Therefore, in a similar manner, s 223 is also designed to protect unsecured creditors, leaving the rights of secured creditors intact, by preserving the 'free' property of the wound up company to await the distribution of those assets among the unsecured creditors. The land, being property charged to the first respondent and subject to an irrevocable power of attorney given to the first respondent, was not therefore among the property that s 223 of the Companies Act 1965 intends to preserve.

[183] The position of a secured creditor under the Companies Act 1965 was

dealt with in *Balasubramaniam*'s case by the Federal Court. The Federal Court pointed out that under sub-s 291(2) of the Companies Act 1965, the laws on bankruptcy apply, inter alia, to the rights of secured and unsecured creditors. In particular, s 42 of the Bankruptcy Act 1967 and Schedule C to that Act are applicable by virtue of sub-s 291(2) of the Companies Act 1965.

[184] The Federal Court, after referring to the judgment of Abdul Kadir Sulaiman J (as His Lordship then was) in *Malayan Banking Bhd v The Official Assignee [Receivers of the estate of Velu Marimuthu (Bankrupt)]* [1993] 2 AMR 3400 and the decision of the Federal Court in *Director of Customs, Federal Territory v Ler Cheng Chye (liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600, had this to say:

> The combined effect of s 291(1) and (2) of the Act and s 42 of the Bankruptcy Act and Schedule C thereto is that there is no mandatory requirement for a secured creditor to come under the liquidation. He has the option of either relying entirely on his security for which he is not obliged to submit a proof of debt. If he however decides to come under the liquidation, he submits proof of his debt and will be entitled to a dividend in respect of the unsecured portion. If he does not submit proof of his debt, then pursuant to para 16 of Schedule C, he shall be excluded from participating in a dividend.

[185] In my view, therefore, the sale of the land to the second respondent was not caught by the provisions of s 223 of the Companies Act 1965.

CONCLUSION

[186] To summarise, in view of the fact that the land was held by the first respondent as security for an overdraft facility granted to the appellant, and as the sale of the land was done pursuant to a power of attorney which survived the winding up of the appellant, and as the sale was by the first respondent as a secured creditor for and on behalf of the appellant as the chargor, the sale of the land to the second respondent did not contravene the provisions of Part 16, Chapter 3 of the National Land Code or s 223 of the Companies Act 1965. That sale was a valid sale.

[187] This appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Reported by Kohila Nesan